Mike-Sell's Potato Chip Company *and* International Brotherhood of Teamsters (IBT), General Truck Drivers, Warehousemen, Helpers, Sales, and Service and Casino Employees, Teamsters Local Union No. 957. Case 09–CA–184215

December 16, 2019

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

On July 25, 2017, Administrative Law Judge Andrew S. Gollin issued the attached decision in this proceeding, finding that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act. The Respondent filed exceptions and a supporting brief, the General Counsel and the Union filed answering briefs, and the Respondent filed reply briefs.

On August 2, 2018, the National Labor Relations Board remanded the judge's decision for further consideration in light of *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017).[1] On December 27, 2018, the judge issued the attached supplemental decision, in which he reaffirmed his prior findings of violations with some modifications to his previous analysis. The Respondent filed exceptions with supporting argument, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision, the supplemental decision, and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

Introduction

The main issue presented in this case is whether the Respondent violated Section 8(a)(5) of the Act by unilaterally selling four sales routes that were assigned to bargaining-unit drivers to nonemployee independent distributors in 2016. In both his original and supplemental decisions, the judge found that the Respondent violated the Act because it had failed to prove an established past practice that would have justified its unilateral action. For the reasons set forth below, we disagree and find that the Respondent's sales of the four routes constituted a continuation of the status quo because the sales were consistent with a longstanding past practice. Therefore, we reverse the judge and find that the Respondent was not obligated to bargain with the Union about its decision to sell those routes. Consequently, we also reverse the judge's related finding that the Respondent violated Section 8(a)(5) by failing to provide information related to the sale of the routes that the Union requested in order to bargain about the sales decisions. We shall therefore dismiss the complaint in its entirety.

Facts

Background

The Respondent is engaged in the production and distribution of snack foods. Production takes place at plants in Dayton, Ohio, and Indianapolis, Indiana. The Respondent uses employees ("route sales drivers" or "company drivers") to deliver its products from the plants to distribution centers, and it uses both route sales drivers and non-employees ("independent distributors")[3] to deliver products from distribution centers to customers. For over 30 years, the Union has represented the route sales drivers. The most recent collective-bargaining agreement of record between the parties was in effect from November 17, 2008, to November 17, 2012.

Due to the steady decline in its net worth over the last several years, the Respondent has been shifting the distribution work to independent distributors by selling company delivery routes. The independent distributors perform the same basic tasks as company drivers but, unlike the drivers, the independent distributors assume the costs and liabilities associated with purchasing, storing, transporting, and selling the Respondent's products. To a degree, the Respondent's sale of delivery routes to independent distributors has also corresponded with an overall downsizing of its operations from as many as 10 distribution centers in the 1980s to a single remaining distribution center in Dayton.

The route sales of record began in 1998 or 1999, when the Respondent closed its Hamersville, Ohio, distribution center and sold a company sales route that operated out

[1] 366 NLRB No. 143 (2018).

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the absence of exceptions, we adopt the judge's dismissal of the complaint allegation that the Respondent violated Sec. 8(a)(5) by failing to bargain with the Union prior to selling two delivery vehicles to independent distributors.

[3] Independent distributors are individuals or entities that enter into agreements with the Respondent for the primary right to distribute its products within a defined geographic territory.

of that location. In 2002, the Respondent closed its Portsmouth, Ohio, distribution center and sold four sales routes to an independent distributor. Between September 2006 and August 2011, the Respondent sold six more sales routes.[4] Although the Respondent notified the Union regarding most of these route sales, the Union did not object to or request to bargain over the decision to sell the routes.

In October 2011, the Respondent informed the Union that it intended to sell a sales route in Marion, Ohio. The Union, for the first time, grieved the Respondent's decision to sell the route. The matter went to arbitration, and the Union's grievance was denied. The arbitrator, Michael Paolucci, found that the management rights provision in the collective-bargaining agreement gave the Respondent the right to control distribution and determine profitability, which included the right to sell the unprofitable Marion route to a third party. The arbitrator noted, among other things, that the Respondent showed that it had a history of selling sales routes without objection from the Union.

Following the issuance of the arbitrator's decision, the Respondent continued its practice of selling sales route to independent distributors. In May 2012, the Respondent sold the Celina/Coldwater company sales route. In late 2012, the Respondent sold 29 sales routes in Columbus, Sabina, and Cincinnati, Ohio. In April 2013, the Respondent sold five sales routes in Greenville, Ohio. In July 2013, the Respondent sold its four Springfield, Ohio, routes.[5] The Respondent informed the Union regarding most of the above sales, but the Union did not object to the Respondent's decisions to sell or seek to bargain about them.[6]

In April 2016,[7] the Respondent sent the Union a letter stating that, in accordance with the Respondent's rights as recognized by the Paolucci arbitration decision, the Respondent was considering selling three Dayton, Ohio, sales routes (Routes 102, 104, and 122) to independent distributors. On July 11, the Respondent informed the Union that it was selling Route 102. On August 29, the Respondent notified the Union that it was selling Routes 104 and Route 122. On August 31, the Union sent the Respondent a letter contesting the Respondent's assertion that the Paolucci arbitration decision gave it the authority to sell Routes 104 and 122. The Union demanded that the Respondent meet and bargain over the decision to sell sales routes 104 and 122, requesting certain information in preparation for bargaining. On September 12, the Respondent advised the Union that, in accordance with its rights as recognized by the Paolucci arbitration decision, the Respondent was selling another route to an independent distributor (Route 131).

The Judge's Decisions

In his initial decision, the judge found that the Respondent violated Section 8(a)(5) and (1) by unilaterally subcontracting bargaining unit work when selling the four routes in 2016 to independent distributors and by failing to provide the Union with relevant requested information about the sale of Routes 104 and 122. In so finding, the judge, among other things, rejected the Respondent's defenses that its decisions to sell the routes did not involve a mandatory subject of bargaining, and, further, that even if they did, the Respondent's actions were consistent with its past unilateral practice of selling sales routes to independent distributors.

In his supplemental decision, the judge purported to apply *Raytheon Network Centric Systems*, supra, 365 NLRB No. 161, as directed by the Board's remand order, when again finding that the Respondent failed to establish that the unilateral sale of any of the four routes in 2016 was consistent with a past practice. He found both that the Respondent's prior sales of company sales routes were "neither regular nor consistent" and that the reasons for the 2016 sales "materially varied in kind and degree" from prior sales that he determined were all based on unprofitability. Based on his understanding of the complaint allegations, the judge specifically found a unilateral change violation in the absence of proof of a consistent past practice for the sale of Route 102. The judge further found that the Respondent could not in any event rely on a past practice defense to justify the sales of Routes of 104, 122 and 131 because of his understanding that *Raytheon* still required decisional bargaining upon the Union's request. Accordingly, he found that the Respondent unlawfully refused the Union's requests to bargain over the decisions to sell those routes.

Analysis

Although we agree with the judge that the Respondent's decisions to sell the four routes in 2016 involved a mandatory subject of bargaining, we find that he erred in his interpretation and application of *Raytheon* and the precedent specifically reaffirmed in that decision. Con-

[4] Specifically, in September 2006, the Respondent sold its Muncie, Indiana sales route; in early 2009, the Respondent sold the Mansfield, Ohio sales route; in late 2009, the Respondent sold two sales routes (the Newark/Granville/Zanesville and Lancaster/Hocking Hills/Athens routes); and in August 2011, the Respondent sold two sales routes (the Lancaster/Lexington and the Newark/Granville/Zanesville routes).

[5] Many of the above routes reverted back to the Respondent after they were sold and were then usually resold to another independent distributor or abandoned, again without bargaining with the Union.

[6] In some instances, at the Union's request, the parties engaged in effects bargaining.

[7] All dates are in 2016, unless otherwise noted.

trary to the judge and our dissenting colleague, we find that the Respondent successfully established that the sale of each of those routes was consistent with its 17-year past practice of unilaterally selling sales routes to independent distributors. Accordingly, the sale of those routes did not involve a change requiring the Respondent to bargain about the decisions to sell, even if the Union requested bargaining about the decisions. Further, because we find that the information sought by the Union was only relevant to its request to bargain about the Respondent's decision to sell two of the routes, the Respondent did not have an obligation to provide that information.

The Respondent Met Its Burden of Proving a Past Practice Defense

Both before and after *Raytheon*, the Board has adhered to the view that an employer may unilaterally continue to make changes that are consistent with an operational past practice, even if that past practice is not expressly set forth within a collective-bargaining agreement. Such unilateral actions are not subject to the statutory bargaining obligation because they do not represent changes in the status quo within the meaning of *NLRB v. Katz,* 369 U.S. 736 (1962).

The party asserting the existence of a past practice bears the burden of proving that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to reoccur on a consistent basis. E.g., *Sunoco, Inc.*, 349 NLRB 240, 244 (2007). The question presented here is whether the Respondent met that burden. As previously stated, the judge found that it did not because the number of unilateral route sales differed from year to year and the route sales in 2016 differed in kind from those in prior years, which he found to be based on the unprofitability of the routes sold. We disagree with the judge on both supposed points of distinction.

On the first point, we find that the Respondent's history, without exception, of unilaterally selling 51 driver routes to independent distributors over a span of 17 years is sufficient to establish a past practice of such regularity and frequency that employees would expect and recognize the contested 2016 route sales as a continuation of that established operational process. Contrary to the judge and our dissenting colleague, the concepts of regularity and frequency sufficient to prove a past practice do not require that the challenged unilateral actions must have taken place at set intervals and in the same number on each and every occasion of change.

We recognize that the benefit plan changes at issue in *Raytheon* did take place on an annual basis over a period of 10 years or more, but the Board did not there hold that this regularity was a required element in proof of past practice. Annual change on a certain date is a typical characteristic of health and welfare benefit plans, but not of subcontracting practices. To require the same pattern of regularity for subcontracting would effectively mean that employers could rarely, if ever, prove a past practice, even if unilateral subcontracting had been a continuing feature for many years of the parties' bargaining relationship, as in this case. The *Raytheon* Board specifically referred to and reaffirmed two prior cases---*Shell Oil Co.*, 149 NLRB 283 (1964), and *Westinghouse Electric Corp. (Mansfield Plant*), 150 NLRB 157 (1965)—where the finding of a past practice was based on longtime and frequent subcontracting actions whenever the need arose. In *Shell Oil*, the employer had a history of subcontracting "miscellaneous construction and maintenance work." 149 NLRB at 284. The Board found that the three unilateral subcontracting actions at issue in the case were consistent with this "*frequently invoked* practice of contracting out *occasional* maintenance work on a unilateral basis . . . ." Id. at 289 (emphasis added). Similarly, in *Westinghouse*, 150 NLRB at 1574–575, the Board found that the employer's challenged unilateral subcontracting practices were lawful because they were consistent with thousands of previous individual subcontracting actions that had taken place for more than 20 years. In neither of these cases did the Board examine whether these subcontracting actions took place according to a regular and recurrent time pattern, much less suggest that individual subcontracting actions must, or in fact did, occur in the same number at set intervals. The frequency of their occurrence over a prolonged time period, standing alone, was sufficient to establish a past practice of unilateral subcontracting actions that could continue without bargaining about new subcontracting decisions.

To repeat, between 1998 and 2016, the Respondent unilaterally sold a total of 51 company driver routes. Even if there were no sales in several of those years, the overall frequency and number of such unilateral sales that continued without exception over a prolonged period support finding that the Respondent has met its burden of proving that the sales occurred with such regularity and frequency that employees would reasonably expect the practice to reoccur on a consistent basis. The 2016 subcontracting actions did not represent a "departure from the norm." *Westinghouse*, 150 NLRB at 1576. Accordingly, we find that the Board's analysis in *Raytheon* is consistent with and supports our finding that the Respondent's longstanding history of selling its sales routes to independent contractors is sufficient to establish a past practice.

That brings us to the second point of disagreement with the judge and our dissenting colleague: whether the Respondent's 2016 route sales were "similar in kind and degree" to the actions that constitute the established past practice. In *Raytheon*, the Board expressly overruled the restrictive interpretation of the similarity standard set forth in *E.I. du Pont de Nemours*, 364 NLRB No. 113 (2016) (*DuPont*), and the precedent upon which that holding relied. Specifically, the *Raytheon* decision criticized the *DuPont* decision for "[distorting] the long-understood, commonsense understanding of what constitutes a 'change,'" *Raytheon*, 365 NLRB No. 161, slip op. at 1, and endorsed Board precedent holding that "an employer may lawfully take unilateral actions where those actions are similar in kind and degree with what the employer did in the past, even though the challenged actions involved substantial discretion." Id. slip op. at 16. In accord with this precedent, the *Raytheon* Board had no difficulty in determining that the respondent's disputed 2013 modifications to employee healthcare benefits did not constitute a unilateral change because they did not materially vary in kind or degree from the broad discretionary pattern of benefit changes made in prior years. Id., slip op. at 18.

In this case, the Respondent exercised broad discretion in determining what, when, and how many route sales to make in accord with operational needs over a 17-year period, but the frequently repeated action taken in each instance was always the sale of a route serviced by a company driver to an independent distributor. As such, the route sales are not meaningfully distinguishable from the discretionary benefit changes made in *Raytheon* or from the subcontracting past practices that the Board found were not materially different in degree and kind in *Westinghouse* and *Shell Oil* despite the fact that the specific work subcontracted out varied significantly.

Notwithstanding this precedent, the judge and our dissenting colleague contend that the sale of the four company routes materially varied in kind and degree because, unlike prior sales, they were not sold due to their unprofitability. We disagree that this is a valid distinction. Nothing in the controlling Board precedent discussed above suggests that an employer must have the same reasons, economic or otherwise, in order to establish that actions in line with a prolonged pattern of recurrent actions are similar in kind and degree to prior actions. In fact, no inquiry was made into the reasons for the recurring changes made in *Raytheon*, *Shell Oil*, and *Westinghouse*. Moreover, we find it highly unlikely that if such an inquiry had been made, the result would show all changes were made for the same reason. To demonstrate conformity with an established past practice, a party need not show that the underlying reason for its action is exactly the same or that it relied on consistent criteria to make the decision. The imposition of such a requirement would effectively overrule *Raytheon* and reinstate the restrictive definition of past practice endorsed in *DuPont*. To establish the existence of a past practice, it is enough to show that frequent, recurrent, and similar *actions* have been taken, for whatever reasons, such that employees would recognize an additional action as part of "a familiar pattern comporting with the [r]espondent's usual method of conducting its manufacturing operations." *Westinghouse*, supra, 150 NLRB at 1576. That is what the Respondent has done here.

In sum, the Board's holdings in *Raytheon*, *Shell Oil*, and *Westinghouse* make clear that the Respondent's route sales in 2016 did not materially differ from its established past practice of unilaterally selling sales routes. Contrary to our dissenting colleague, this case involves neither an extension of the holding in *Raytheon* nor a departure from past practice precedent. We believe that it is she, not we, who seeks to redefine and limit that precedent in accord with the dissenting views expressed in her joint dissent with Member Pearce in *Raytheon*. As a final matter, we also reject the judge's conclusion that, irrespective of whether the Respondent had a past practice of unilateral route sales, it had an obligation to bargain with the Union, upon its request, about the decisions to sell Routes 104, 122 and 131. This conclusion was based on certain language that he cited from *Raytheon* at 365 NLRB No. 161, slip op. at 4 fn. 11. To clarify, an employer has no statutory obligation under *Katz* to bargain about a decision to take unilateral action that is consistent with a past practice during the parties' collective-bargaining relationship. That action represents a continuation of the status quo. The language in *Raytheon* was only meant to underscore the separate principle that an employer still has the obligation to bargain, upon the union's request and at times when Section 8(d) requires bargaining, about changing that status quo for the future. That point was clearly stated in *Shell Oil* and unequivocally affirmed in *Raytheon*, 365 NLRB No. 161, slip op. at 7 fn. 31 (a footnote specifically cross-referenced in the language relied on by the judge).

The Union in this case only requested bargaining about the decisions to sell three driver routes in 2016. The Respondent had no obligation to do so before taking actions consistent with the status quo established by past practice. However, a past practice would not preclude the Union from requesting to bargain over the subject of changing the past practice itself, which, in this case, is the Respondent's longstanding practice of selling routes

to independent distributors. The Union did not make such a request in this case.[8]

In summary, we find that the Respondent's sale of the four routes in 2016 represented a continuation of the status quo created by its past practice of selling numerous sales routes between 1998 and 2016. Accordingly, the Respondent did not violate the Act by refusing to bargain with the Union about the sales of the routes.

The Respondent Was Not Required to Provide the Requested Information

We also dismiss the complaint allegation that the Respondent violated Section 8(a)(5) by failing to provide the Union with information requested in the Union's August 31 letter concerning the sale of Routes 104 and 102. In short, the Union requested that the Respondent provide certain information in preparation for decisional bargaining about the route sales. It did not request the information for purposes of bargaining about the effects of those sales on unit employees or pursuant to a request to bargain about a change in the past practice of unilateral route sales. Because we have found that the Respondent established that the sale of the four routes was consistent with its past practice of unilaterally selling sales routes to independent distributors, we find that the requested information is not relevant because the Respondent had no duty to bargain with the Union regarding the sale of Routes 104 and102.

Conclusion

Based on the foregoing, we find that the Respondent lawfully continued its past practice when it unilaterally sold the four company routes in 2016 and that it lawfully refused to provide information requested by the Union for the purpose of bargaining about the decisions to sell two of those routes. Accordingly, we reverse the judge and will dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. December 16, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

In *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017), the Board, over my dissent, made it easier for employers to make unilateral changes in union-represented employees' terms and conditions of employment without collective bargaining. Misreading the seminal Supreme Court case on unilateral changes,[1] the majority dismantled longstanding precedent defining when an employer can permissibly continue a "past practice" without bargaining over the individual changes involved. The result was to dramatically expand the circumstances when employers can lawfully refuse to bargain over changes to their workers' terms and conditions of employment.

Today, the majority's application of *Raytheon* further expands employers' power to make such changes without bargaining by further diluting the definition of a "past practice." Disregarding still-binding precedents that *Raytheon* did not overrule, the majority finds that the Respondent's sporadic history of transferring delivery routes from employees to independent distributors on seven occasions over a period of seventeen years—transfers made pursuant to the authority of a contractually-negotiated management rights clause that was applicable at the time—made the transfer of routes a "past practice." The majority concludes that the employer is now privileged to transfer bargaining unit work without restriction even after the contract (and the management rights clause) expired.

To reach this counter-intuitive conclusion, the majority effectively jettisons the longstanding requirement under Board law that unilateral changes must be "regular and consistent" before they can be deemed to be a "practice." This requirement is not mere semantics—it ensures that employees will recognize that a pattern of changes is in fact a practice that is a part of their terms and conditions of employment—and thus helps avoid labor disputes when subsequent similar changes are made.

This further weakening of the law clearly undermines the "practice and procedure of collective bargaining"—contrary to Congress's express statement in Section 1 of the National Labor Relations Act that it is the policy of the United States to *encourage* collective bargaining. Even taking *Raytheon* as valid precedent, then, the majority's decision today goes too far.

I.

The Respondent produces snack foods, which it distributes from its distribution center in Dayton, Ohio. It

[8] In light of our analysis, we find no need to pass on whether the judge correctly determined that the General Counsel's theory of violation for the sale of Routes 104, 122, and 131 was based on a refusal to bargain, as opposed to the unilateral change doctrine that undisputedly applied to the sale of Route 102.

[1] *NLRB v. Katz*, 369 U.S. 736 (1962).

has had a collective-bargaining relationship of over 30 years with the Union representing a unit including the Respondent's route sales drivers. The drivers manage, track, and deliver products directly to customers' stores, and receive commissions as well as pension, health, and welfare benefits under the parties' collective-bargaining agreement.[2] The Respondent also uses unrepresented independent distributors to handle the same delivery tasks. The Respondent's relationship with those distributors is governed by individual agreements that give the distributors the primary right to deliver products within a defined geographic territory.[3]

Beginning in 1998, the Respondent has sold a number of employee-driven routes to independent distributors in an effort to relieve itself of the costs, risks, and liabilities associated with purchasing, storing, transporting, and selling its products, which the independent distributors assume when they purchase a route. The judge charted the number of routes the Respondent sold each year from 1998-99 through 2015 as follows:

[2] The most recent collective-bargaining agreement covering the drivers' terms and conditions of employment expired on November 17, 2012. It contained a management-rights clause, which the Respondent relied on to authorize some of its route sales; it also contained a Route Bidding" provision that allowed employees to displace less senior employees "[i]n the event that it becomes necessary to eliminate a route or combine one route with another."

[3] The independent distributor agreements reserved to the Respondent control over the contours of a territory and allowed either party to terminate the agreement by giving 30 days' notice. Accordingly, some routes that were sold later reverted to the Respondent upon failure or bankruptcy.

Year	# of Company Sales Routes Sold	Routes Sold
1998-1999	1	Hamersville route
2000	0	
2001	0	
2002	4	Portsmouth routes[4]
2003	0	
2004	0	
2005	0	
2006	1	Muncie route
2007	0	
2008	0	
2009	3	Mansfield, Newark/Granville/Zanesville, and Lancaster/Hocking Hills/Athens routes
2010	0	
2011	3	Lancaster/New Lexington, Newark/Granville/Zanesville, and Marion routes
2012	30	Celina/Coldwater and 29 Columbus, Sabina, and Cincinnati routes
2013	9	5 Greenville and 4 Springfield routes
2014	0	
2015	0	

[4] Although the judge found that the Respondent eliminated (as opposed to sold) the Portsmouth routes, he included them in the chart because the Respondent later sold an area covering portions of those routes to an independent distributor.

The judge concluded—as is obvious from the chart—that "prior sales of company sales routes were neither regular nor consistent."[5]

Not only were the sales sporadic, but not all sales adversely affected bargaining unit employees. In some situations, a displaced employee driver "bumped" a less senior employee out of another existing route. In other situations, an employee driver declined to exercise his bidding rights and either retired or resigned.[6] Where there were adverse effects, the parties typically engaged in effects bargaining and negotiated severance packages for the displaced employees.

In at least one instance, however, the Union filed a contractual grievance challenging the Respondent's decision to sell a route. In 2011, the Union grieved the Respondent's sale of a bargaining unit employee's remote, unprofitable route in Marion, Ohio. The grievance was ultimately submitted to Arbitrator Michael Paolucci, who was asked to decide "whether the Company violated the Agreement when it sold the Grievant's route to a third party?" Later the same year, Arbitrator Paolucci decided in favor of the Respondent. Specifically, he interpreted the management-rights clause in the then-applicable collective-bargaining agreement as authorizing the Respondent to transfer an unprofitable route to a third party. But Arbitrator Paolucci's decision did not address whether the Respondent had a statutory obligation to bargain over that decision, nor did it determine whether the Respondent had a past practice that would have excused any such obligation.[7] Notably, the management-rights clause underlying the arbitrator's decision expired in 2012 with the collective-bargaining agreement**.**

The Respondent subsequently sold a number of routes in 2012 and 2013, and the parties bargained over the effects of those sales.[8] After 3 years without any additional route sales, the Respondent announced in 2016 that it was considering eliminating three routes originating from its main distribution center in Dayton, Ohio, citing the Paolucci arbitration decision. The Union grieved the Respondent's announcement and later filed grievances on the sales of Routes 104, 122, and 131.[9] The Union argued that the Paolucci decision applied only to sales of remote, unprofitable routes and did not authorize route sales within the Dayton area. The Union contemporaneously requested bargaining and information regarding the profitability of Routes 104 and 122, which the Respondent refused to provide. The Union filed a charge on September 14, 2016, amended December 9 and May 31, 2017, on the Respondent's sales of Routes 102, 104, 122, and 131, and its refusal to provide the information the Union requested, leading to the complaint in this case.

II.

Before the Board issued *Raytheon*, the judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally selling to independent distributors the four sales routes that had been driven by bargaining unit employees. The judge rejected the Respondent's defense that its action was privileged by a past practice of selling such routes without first bargaining with the Union.[10] Upon remand for reconsideration under *Raytheon*, the judge again found the violations, rejecting the Respondent's additional evidence on its past-practice defense. This conclusion was clearly correct. To understand why, it is essential to briefly summarize the changes to preexisting law made and, equally important, not made in *Raytheon.*

In *Raytheon*, a case involving an employer's unilateral changes to companywide health benefit plans, a Board majority held that even after a collective-bargaining agreement expires—that is, at a time when the employer has a statutory duty to maintain the status quo—an employer may lawfully continue making discretionary changes to mandatory subjects of bargaining, if it had a past practice of making such changes. According to the majority, in those circumstances there has been no "change" that would trigger a duty to bargain; rather, the employer is simply doing what it has always done. But that holding (as I explained in my dissenting opinion) contravenes the Supreme Court's decision in *Katz*, supra, which held that employers may act unilaterally pursuant to an established practice *only* if the changes do *not* involve the exercise of significant managerial discretion. Casting aside that basic restriction, the *Raytheon* Board held that:

> "[h]enceforth, regardless of the circumstances under which a past practice developed—i.e., whether or not the past practice developed under a collective-

[5] The chart does not include sales of routes that reverted to the Respondent and were later resold or abandoned, such as the Mansfield and Hocking Hills/Athens routes sold in 2009, the 29 routes sold in 2012, and the 5 Greenville routes sold in 2013. There is no evidence that the Union was notified or was provided information regarding which drivers, if any, serviced those routes upon reverting to the Respondent.

[6] For example, two of the three drivers affected by the three route sales in 2009 resigned.

[7] Although "past practice" was not the basis for Arbitrator Paolucci's decision, he did note in support of his interpretation of the management-rights clause that "the fact that the Company has done this for some time, without objection of the Union, proved that the parties have accepted it as a normal method of selling routes."

[8] On October 10, 2012, the first day of bargaining for a successor collective-bargaining agreement, the Respondent notified the Union of its intent to sell 29 sales routes in Columbus, Sabina, and Cincinnati, effective the following month. The following year, it sold 9 routes. All 38 of these routes reverted to the Respondent and were resold in 2015 to another independent distributor with no evidence of notice to the Union.

[9] The Union did not file a separate grievance on the decision or on the effects of the sale of route 102 (Xenia territory), whose driver had retired, believing that its May 6, 2016 grievance on the Respondent's announcement of the upcoming sales included this particular sale.

[10] The judge also found that the Respondent further violated Sec. 8(a)(5) and (1) by failing to provide the Union with requested relevant information regarding those sales.

> bargaining agreement containing a management rights clause authorizing unilateral employer action— *an employer's past practice constitutes a term and condition of employment that permits the employer to take actions unilaterally that do not materially vary in kind or degree from what has been customary in the past*."

Raytheon, supra, slip op. at 16 (emphasis added). The upshot is that *Raytheon* permits an employer to make unilateral changes involving significant discretion if the employer has a past practice of making such changes and the future changes "do not materially vary in kind or degree from what has been customary in the past."

Even as it made this change in the law, however, *Raytheon* did not disturb precedent that set the requirements for establishing a "past practice." In *Raytheon*, my colleagues recognized that under longstanding Board precedent, in order for past changes to constitute a "practice," the changes must have been "regular and consistent." In explaining their rationale in that case, they state: "the status quo against which the employer's 'change' is considered must take account of any *regular and consistent* past pattern of change," and "under *Katz*, an 'employer modification' that is consistent with 'any *regular and consistent* past pattern of change' is 'not a "change" in working conditions at all.'" *Raytheon*, supra, slip op. at 5 & fn. 23, 19 fn. 89 (emphasis added).[11] Indeed, even now, the majority pays lip service to the "regular and consistent" standard, citing *Sunoco, Inc.*, 349 NLRB 240, 244 (2007), for the proposition that it is the Respondent's burden to prove that its claimed past practice occurred "with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis."[12]

Similarly, Raytheon also did not disturb longstanding Board precedent finding that when an employer's past changes have *not* been "regular and consistent"—but rather random and intermittent, such that employees would not know what to expect from the employer or when—there is no "past practice" that would permit future unilateral changes.[13]

Thus, *Raytheon* left intact decades of established law defining what unilateral changes are considered "regular and consistent" enough to constitute a past practice. Even after Raytheon, a "past practice" is and should be more than just something that an employer has done on occasion in the past. Indeed, even the second part of the majority's analysis in *Raytheon* recognized at least some minimal restraint on the employer's ability to make unilateral change—*Raytheon* itself acknowledges that, even when an employer has an established past practice of making certain changes, the employer's changes must be analyzed to determine if they are "similar in kind and degree" to those prior changes before the employer is excused from bargaining. *Raytheon,* supra, slip op. at 13.

IV.

Applying those basic principles to the present case, it should be clear that the Respondent did not have a "regular and consistent" practice of unilaterally transferring sales routes to independent distributors, such that its employee drivers would have recognized transfers as a term and condition of their employment. And even if the Respondent did have such a practice, the 2016 transfers at issue were not similar in kind and degree to the prior transfers. Thus, the judge's decision finding a violation of Section 8(a)(5) is correct, even under *Raytheon*.

A.

As illustrated by the judge's charting out of the Respondent's route sales from 1998 through 2015, the sales were anything but "regular and consistent." Significantly, the Respondent did not sell *any* routes in 2000, 2001, 2003, 2004, 2005, 2007, 2008, 2010, 2014, and 2015. So, during the relevant period, there were actually more years in which there were *no* sales (10) than years with sales (7). That hardly seems "regular" or "consistent."[14] And even in the 7 years with sales, there were wildly varying numbers of sales; e.g., 30 in 2012 while only 3 in 2011 and only 1 in 2006. In those circumstances, it is

[11] This emphasis on regularity is evident from the barn-painting analogy the *Raytheon* Board adopted from former Member Miscimarra's dissent in *E.I. Du Pont de Nemours,* 364 NLRB No. 113 (2016), which *Raytheon* overruled. *Raytheon*, supra, slip op. at 10-11. According to that analogy, an employer may use its discretion in choosing the exact shade of paint and the time of painting, but the regularity of the practice lies in painting the barn blue *every summer* and green *every winter* (emphasis added).

And the common theme in the cases the *Raytheon* Board relied on involved the consistent, established practice of sharing healthcare premium costs with employees based on a set percentage ratio each year. See, e.g., id. at 5 fn.20, 21, citing *Post-Tribune Co.*, 337 NLRB 1279, 1280 (2002); *Luther Manor Nursing Home*, 270 NLRB 949, 959 (1984), affd. 772 F.2d 421 (8th Cir.1985); and *A-V Corp.*, 209 NLRB 451, 452 (1974).

[12] The Board also recently reiterated these requirements in a subcontracting case. *IGT d/b/a International Game Technology*, 366 NLRB No. 170, slip op. at 9 (2018), citing *Hospital San Cristobal*, 358 NLRB 769, 772 (2012), reaffd. 363 NLRB No. 164 (2016).

[13] See, e.g., *Philadelphia Coca-Cola Bottling Co*., 340 NLRB 349, 353-354 (2003) (finding no established past practice where the production-related bonuses did not occur on a regular and consistent basis every year, but rather were intermittently handed out by the employer to specific employees at its own discretion and time); *City Cab Co. of Orlando*, 273 NLRB 1344, 1349 (1985), enfd. 787 F.2d 1475, 1479 (11th Cir. 1986) (finding that frequent, but irregular, ad hoc changes to cab rental rates, such that drivers "never knew what to expect," did not constitute a "past practice"); accord *Advanced Life Systems,* 898 F.3d 38, 49-50 (D.C. Cir. 2018) (reviewing court found no past practice because, among other things, the amounts and frequency of the employer's Christmas payments were unpredictable, as opposed to "regularized", "predictable," and "a consistent long-term pattern of foreordained bonuses"), reversing in relevant part 364 NLRB No. 117 (2016).

[14] See, e.g., *Arc Bridges v. NLRB,* 662 F.3d 1235, 1239 (D.C. Cir. 2011) (finding no established pattern to justify the employer's action where employer granted wage increases in only 6 out of 15 years, less than half the time).

difficult to see how any reasonable employee would understand that such sales should be considered the norm, especially taking into account that there were multiple periods of 2-to-3 consecutive years in which there were *no* sales; e.g., 2000–2001, 2003–2005, 2007–2008, and 2014–2015. In similar circumstances, the Board has found that such hiatuses defeat an employer's asserted "past practice" defense.[15]

The majority's finding to the contrary is clearly erroneous. First, the majority glosses over the "regular and consistent" rule by aggregating the numbers of sales occurring between certain years and over the entire 17-year period. This move obscures the random and intermittent nature of the Respondent's purported "practice." Similarly, the majority focuses on the overall "frequency" of the sales; in essence, the majority seems to find that if an employer makes *a lot* of changes, then that is enough. But this finding contradicts established Board law—and even simple dictionary definitions of "regular" and "consistent."[16] Contrary to the majority, the "frequency" of the route sales here demonstrates only the volume, while utterly failing to establish the important factors of regularity and consistency that would inform employees that such sales are a term and condition of their employment.

The record fully supports the judge's conclusion that the Respondent's past route sales did not constitute a past practice because the sales were "neither regular nor consistent."[17] Accordingly, without meeting the threshold issue—a cognizable past practice—the Respondent's defense necessarily fails, even without considering whether the 2016 sales were "similar in kind and degree" to past sales.

B.

But even accepting the majority's premise that the 1998-2015 sales constituted a past practice, the Respondent's defense still fails because the Respondent has not established that the 2016 route sales were similar in *kind*. The Respondent announced in April 2016 that it would be selling three routes out of Dayton, Ohio, pursuant to Arbitrator Paolucci's decision. But the judge found that the route in the arbitrator's decision was distinguishable because it was a *remote* route, whereas the intended 2016 sales included three routes originating from the heart of the Respondent's operation in Dayton. The difference, the judge found (based on the Respondent's argument to the arbitrator) was that remote routes imposed significantly greater costs on the Respondent due to the expenses of maintaining a storage bin and delivering to a remote area. The judge found no evidence that the routes out of Dayton had similar expenditures. So, from the perspective of the Union and the bargaining unit employees, the 2016 sales reasonably would have seemed different in kind from past sales of remote routes, including the one at issue in the Paolucci decision.[18]

Nor has the Respondent shown that the 2016 sales were similar in *degree* to prior sales. Here, again, the random and intermittent numbers of past sales highlights the irrationality of the majority's decision. The sheer range of sales, from zero in some years to a high of 30 in one year, would have made it nearly impossible for employees to understand whether the 4 sales in 2016 were simply a part of the Respondent's supposed practice of selling routes or perhaps—again, considering that they were located in Dayton—signaled something more ominous, such as a more serious financial problem for the Respondent or even a future closing. Whatever the answer may have been to these uncertainties, the fact of the uncertainties alone highlights why it is simply unreasonable to conclude that employees should be charged with recognizing the sales as part of their terms and conditions of employment.[19]

V.

In sum, the Respondent has failed to meet its burden to show that it had a past practice of selling routes prior to 2016 that occurred "with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis."

[15] See, e.g., *Santa Barbara News-Press*, 358 NLRB 1415, 1416 (2012), reaffd. 362 NLRB 252 (2015), enfd. 2017 WL 1314946 (D.C. Cir. Mar. 3, 2017).

[16] Merriam-Webster's online dictionary defines "regular" as "recurring, attending, or functioning at fixed, uniform, or normal intervals." The definition of "consistent" is "marked by harmony, regularity, or steady continuity: free from variation or contradiction." https://www.merriam-webster.com/ (November 6, 2019).

[17] The majority suggests that the Union's failure to object to some of the route sales shows that it was aware of the past practice. It is well settled, however, that "a union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time," and a history of unilateral changes is material only to the extent that there is a "thread of similarity running through and linking" the changes. *Caterpillar, Inc*., 355 NLRB 521, 522 (2010), enfd. per curiam, 2011 WL 2555757 (D.C. Cir. May 31, 2011) (unpublished decision). Board law should not create an incentive for unions to object reflexively to unilateral changes, even those that do not adversely affect unit employees, for fear that failure to object would preclude the union from objecting to a future, important change. Such a rule is hardly conducive to stable labor relations and productive bargaining.

[18] The majority makes a meaningless and unsupported distinction in rejecting the judge's discussion of the "circumstances" or reasons for some of the route sales. The characteristics that describe or distinguish a route are the most obvious bases for determining, from an employees' perspective, whether the Respondent's sales of routes were "similar in kind and degree."

[19] I reiterate my objection, for the same reasons explained in my dissenting opinion in *Raytheon*, to the majority's near-total reliance here on *Shell Oil Co*., 149 NLRB 283 (1964) and *Westinghouse Electric Corp. (Mansfield Plant)*, 150 NLRB 1574 (1965). These cases, from which the *Raytheon* Board lifted the "similar in kind and degree" language from one factor of a multi-factor test, are applicable specifically to subcontracting. *See Raytheon,* 365 NLRB No. 161, slip op. at 30-31 and cases cited therein (McFerran, dissenting). Moreover, in those cases the employer's past practice of subcontracting did *not* lack criteria, and the determinative factor was the potential adverse impact on employees' jobs.

Even if it had succeeded in establishing a past practice, the 2016 sales were not similar in kind and degree with what the Respondent had done before. Thus, by refusing the bargain over the sales, the Respondent violated Section 8(a)(5) and (1) of the Act.[20]

The majority's result here is incorrect, but the analytical shift this case signals is just as troubling. This case signals an expansion of *Raytheon* to license unilateral changes whenever an employer can show that it has made even remotely similar changes in the past, no matter how random and intermittent those changes may have been. The result is an invitation to more unilateral action, which runs directly contrary to the fundamental policy of the Act to promote collective bargaining and preserve industrial peace. That simply cannot be right—but it is certainly in line with a string of recent Board decisions that enable employers to avoid collective bargaining with the unions that represent their employees.[21]

Accordingly, I dissent.

Dated, Washington, D.C. December 16, 2019

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

Linda Finch, Esq., for the General Counsel.
Jennifer Asbrock, Esq., for the Respondent.
John R. Doll, Esq., for the Charging Party.

DECISION

I. INTRODUCTION[1]

ANDREW S. GOLLIN, ADMINISTRATIVE LAW JUDGE. This case was tried in Cincinnati, Ohio, from May 31 through June 2, 2017. The complaint, as amended, alleges that Mike-Sell's Potato Chip Company (Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act) by: (1) failing or refusing to bargain with the International Brotherhood of Teamsters (IBT), General Truck Drivers, Warehousemen, Helpers, Sales and Service, and Casino Employees, Teamsters Local Union No. 957 (Union) about the decision to sell four company sales routes to independent distributors; (2) failing to bargain with the Union prior to selling two delivery vehicles to independent distributors; and (3) refusing to provide the Union with requested information related to the sale of the company sales routes. Respondent denies the alleged violations, contending its decision to sell the routes was not a mandatory subject of bargaining. And, even if it had been, Respondent argues the Union waived its right to bargain over the decision, which obviates the Union's claimed need for the requested information. Respondent contends the allegation over the vehicle sales has no merit and is untimely under Section 10(b) of the Act. Based upon the evidence and applicable law, I find the decision to sell the four sales routes amounted to subcontracting of unit work, which is a mandatory subject of bargaining. I further find that the Union did not waive its right to bargain, and that the requested information was both relevant and necessary to the Union for its role as bargaining representative. As for the sale of the delivery vehicles, the General Counsel's posthearing brief does not address this allegation, and, thus, it appears to have been abandoned. In any event, I find the allegation is barred under Section 10(b) of the Act, because the Union had constructive notice of those sales more than 6 months prior to the filing of the amended charge.

II. STATEMENT OF THE CASE

On September 14, 2016, the Union filed an unfair labor practice charge against Respondent, docketed as Case 09–CA–184215, alleging violations of the Act related to the sale of the routes. On December 9, 2016, the Union filed a first-amended charge in Case 09–CA–184215. Based on its investigation, on March 17, 2017, the Regional Director for Region 9 of the National Labor Relations Board (the Board) issued a complaint against Respondent alleging that it violated Section 8(a)(5) and (1) of the Act when it failed to bargain with the Union regarding the decision to sell the four routes and when it failed or refused to provide the Union with the requested information. On March 27, 2017, Respondent filed its answer, and, on April 24, 2017, filed its amended answer, denying the alleged violations of the Act.

On May 31, 2017, prior to the start of the hearing, the Union filed a second-amended charge in Case 09–CA–184215, adding an allegation that Respondent violated Section 8(a)(5) and (1) of the Act since September 2016, when it unilaterally changed terms and conditions of employment by entering into contracts to sell owner-operator equipment. At the conclusion of its case-in-chief, the General Counsel orally moved to amend the complaint to include allegations that Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally sold two delivery vehicles without bargaining with the Union. At the hearing, Respondent denied the amended allegations, as both untimely and without merit. (Tr. 220–221; 1062–1064.)

At the hearing, all parties were afforded the right to call, examine, and cross-examine witnesses, present any relevant documentary evidence, and argue their respective legal positions orally. Respondent, Charging Party, and General Counsel filed post-hearing briefs, which I have carefully considered. Accordingly, based upon the entire record, including the posthearing

[20] Having found those violations, I would also agree with the judge that the Union demonstrated the relevance of its information request regarding Routes 104 and 122, and adopt his finding that the Respondent violated Section 8(a)(5) and (1) by failing to provide the information requested by the Union.

[21] See, e.g., *MV Transportation, Inc.*, 368 NLRB No. 66 (2019) (overruling Board's longstanding "clear and unmistakable" waiver doctrine in determining whether collective-bargaining agreement authorizes unilateral employer action); *Oberthur Technologies of America Corp.*, 368 NLRB No. 5 (2019) (requiring union to demand bargaining over particular subject in order to trigger employer's duty to bargain, despite employer's unlawful refusal to recognize union and Board's longstanding "futility" doctrine); *Ridgewood Health Care Center, Inc.*, 367 NLRB No. 110 (2019) (overruling precedent and permitting successor employer to unilaterally set initial employment terms, despite discriminatory refusal to hire predecessor employees in order to evade bargaining obligation). I dissented in each of the cited cases.

[1] Abbreviations in this decision are as follows: "Tr." for transcript; "Jt. Exhs." for Joint Exhibits; "GC Exh." for General Counsel's Exhibit; "C.P. Exh. " for Charging Party's Exhibit; "R. Exh. " for Respondent's Exhibit; "G.C. Br. _" for General Counsel's brief; "C.P. Br. _" for Charging Party's brief; and "R. Br." for Respondent's brief.

briefs and my observations of the credibility of the witnesses, I make the following[2]

III. FINDINGS OF FACT[3]

A. Jurisdiction

Respondent is a corporation with an office and place of business in Dayton, Ohio (Respondent's facility), and has been engaged in the manufacture and distribution of snack foods. In conducting its operations during the 12-month period ending March 15, 2017, Respondent has purchased and received goods at its facility valued in excess of $50,000 directly from points outside the State of Ohio. Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act. Based on the foregoing, I find this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

B. Collective-Bargaining Relationship

For over thirty years, Respondent has recognized the Union as the exclusive collective-bargaining representative of the following appropriate unit of Respondent's employees, within the meanings of Sections 9(a) and (b) of the Act:

> [A]ll Sales Drivers, and Extra Sales Drivers at [Respondent's] Dayton Plant, Sales Division and at [Respondent's] Sales Branch in Cincinnati, Columbus, Greenville, Sabina and Springfield, Ohio and all over the road drivers employed by [Respondent], but excluding all supervisors, security guards, and office clerical employees employed by [Respondent].

Respondent's recognition of the Union as the collective-bargaining representative of the above unit has been embodied in a number of successive collective-bargaining agreements, with the most recent agreement being in effect from November 17, 2008 to November 17, 2012.[4]

The following are provisions contained in the parties' most-recent collective-bargaining agreement:

ARTICLE VIII-B
ROUTE BIDDING

> Section 5 In the event that it becomes necessary to eliminate a route or combine one route with another, employees affected shall have the right to displace a less senior employee. However, displacements shall be restricted to the employees' service location.

ARTICLE XIV
OWNER-DRIVER EQUIPMENT

> Section 1 The Company agrees that it will not employ or contract for owner-driver equipment, and that the Company shall not rent, lease or sublease equipment to members of the Union or any other individual, firm, cooperation or partnership which has the effect of defeating the terms and provisions of this Agreement.

ARTICLE XIX
MANAGEMENTS RIGHTS

> Section 1 Management of the plant and the direction of the working force, including the right to hire, promote, suspend for just cause, disciplining for just cause, discharge for just cause, transfer employees and to establish new job classifications, to relieve employees of duty because of lack of work or economic reasons, or other reasons beyond the control of the company, the right to improve manufacturing methods, operations and conditions and distribution of its products, the right to maintain discipline and efficiency of employees is exclusively reserved to the company. It is understood however, that this authority shall not be used by the company for the purpose of discrimination against any employee because of their membership in the union, and that no provision of this paragraph shall in any way interfere with, abrogate or be in conflict with any rights conferred upon the union or its members by any other clause contained in this agreement, all of which are subject to the grievance procedure.

(Jt. Exh. 1.)

C. Background

1. Respondent's Operations

Respondent is headquartered in Dayton, Ohio, and has two production facilities: one in Dayton, where it manufactures its potato chips, and one in Indianapolis, Indiana, where it manufactures its extruded corn products. Respondent currently has one distribution center, located in Dayton, Ohio.[5] Respondent distributes its snack products to Ohio, Indiana, Illinois, Kentucky, Pennsylvania, and Michigan. (Tr. 232–233.)

Respondent has two distribution methods: direct store delivery and warehouse or direct sales. The direct store delivery method is where a salesperson travels around to retail customers within a geographic territory to take orders and deliver products. The warehouse or direct sales method is where a retailer (e.g., Big Lots) purchases and picks up products from Respondent and then distributes the products out to the retailer's individual stores. (Tr. 233–234.)

Direct store delivery is handled by route sales drivers and independent distributors. Route sales drivers are bargaining unit employees represented by the Union. As the title indicates, these drivers are assigned a route and are responsible for servicing the customers (e.g., grocery stores, retail stores, gas stations, restaurants, etc.) on that assigned route. Their duties include reviewing orders, loading their company-owned trucks with product, traveling to customers, stocking customer shelves, rotating unsold product, performing point-of-sale marketing, and removing expired product. The drivers track orders, deliveries, and sales using a company-owned handheld electronic device. Route sales drivers are paid a commission based on the type and amount of product they sell, as well as

[2] On July 7, 2017, Respondent filed a motion to correct approximately 100 typographical errors in the transcript. After reviewing the transcript, I grant Respondent's unopposed motion.

[3] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case.

[4] The Union also is the exclusive bargaining representative of Respondent's warehouse employees, which are in separate unit and covered by a separate collective-bargaining agreement.

[5] Prior to 2012, Respondent had six distribution centers in Ohio (Cincinnati, Columbus, Sabina, Springfield, Greenville, and Dayton).

additional benefits (e.g., health and welfare benefits, pension, leave, etc.) per the collective-bargaining agreement. The routes can vary as far as number of customers, size of orders, geographic proximity, and sales volume. Routes are assigned to drivers through a seniority-based bidding system.

Independent distributors are individuals or entities that enter into agreements with Respondent for the primary right to distribute Respondent's products within a defined geographic territory.[6] Independent distributors perform the same core tasks as route sales drivers as far as servicing the customers, but, unlike the route sales drivers, they assume the costs and liabilities associated with purchasing, storing, transporting, and selling those products. For example, in addition to paying for the products they sell, distributors are responsible for acquiring, maintaining, and insuring their own delivery vehicle(s), storage location(s), and other tools and equipment. Independent distributors are paid a contractually-agreed upon margin based on the type and amount of product they sell, but do not receive any additional pay or benefits. The specific terms of the arrangement between Respondent and distributors are set forth in the individual independent distributor agreements.[7]

In the last several years, Respondent has experienced a steady decline in its overall net worth ($18 million in 1999, to $5 million currently). (Tr. 235–236). Phil Kazer, Respondent's Executive Vice President of Sales and Marketing, attributed this decline, in part, to larger competitors, such as Frito-Lay, being better positioned because of their size to market, promote, and aggressively price their products; and to grocery and retail stores, such as Kroger, Meijer, and Walmart, increasingly selling snack products under their own private labels—both reducing the retail space available to Respondent to sell its products. Another reason Kazer cited for the decline in net worth is the annual losses Respondent has experienced in its company route sales division (totaling $9 million in losses from 2006 to 2016). (Tr. 243–244). Kazer opined that by using company route sales drivers Respondent remains responsible for the costs, both labor and nonlabor, including, but not limited to, the storing, transporting, and stocking of product, as well as the cost of any unsold product. (Tr. 245–246.) Kazer testified that by selling routes to independent distributors, Respondent transfers this risk of loss from the company onto them.

Kazer testified that in this current changing environment, Respondent believes its greatest opportunity for growth is to move away from distributing and focus more on manufacturing and branding quality products. To that end, over the last several years, Respondent has been selling company delivery routes to independent distributors. In around 2012, Respondent had approximately 70 company driver routes. Today, it has approximately 12 routes. In around 2012, there were approximately 100 routes owned by independent distributors. Today, there are over 170. (Tr. 246–247.)

2. 2012 Arbitration Award

In October 2011, Respondent informed the Union that it intended to sell a remote sales route in Marion, Ohio to an independent distributor (Buckeye Distributing). Respondent was selling the route because, despite various efforts to make it profitable, it continued to lose approximately $1,100 per week. Respondent informed the Union it intended to sell the route within the next 3 or 4 weeks, and that per Article VIII-B, Section 5 of the parties' collective-bargaining agreement, the affected route sales driver (Angie Watson) would be allowed to use her seniority to bump into another route. The Union filed a grievance over the sale and the matter went to arbitration.[8] The Union argued the sale amounted to unlawful subcontracting of unit work not permitted under the parties' agreement. Respondent countered that it was not subcontracting, but rather a change in the Company's distribution methods to reallocate risk of unprofitable routes. Respondent argued it was permitted under the management-rights clause (Art. XIX), and was consistent with prior sales of routes that occurred without the Union's objection. On September 26, 2012, Arbitrator Michael Paolucci issued his decision. He found that this was not a typical subcontracting case, but rather a change in the methodology

[6] For the purposes of this case, territory and route are used interchangeably. (R. Br. 3, fn. 4.)

[7] The following are some of the terms and conditions contained in the individual distributor agreements. The agreement affords the independent distributor the nonexclusive right to buy, sell, and distribute Respondent's products in the distributor's territory. The distributor agrees to use its best efforts to sell, promote the sale of, and distribute the products to retailers located within the territory. If there is any dispute as to the territory boundaries, the final decision is made by Respondent as to which distributor is to service the territory in question, without recourse from the distributors involved. Respondent agrees to sell and deliver to the distributor, in the quantities required for the distributor's wholesale business, and the distributor is expected to sell the product line available. The distributor understands and agrees that Respondent may in its sole discretion, at least once annually, adjust upward or downward any distributor margins, as long as the Respondent provides the distributor with 30-days' written notice. The distributor is required to adhere to the delivery and merchandise standards prescribed by its customers and by Respondent, and to submit all invoices to the Respondent, without exception, within the timeframe set forth in the agreement. The distributor agrees to maintain sufficient inventory of products to meet the needs of the retailers in the distributor's territory. The distributor agrees to indemnify and hold Respondent harmless for any and all losses, damages, and expenses in any way connected with conducting the distributor's business. To that end, the distributor agrees to maintain liability insurance at the level set forth within the agreement. The distributor agrees to accept full responsibility for, and to pay, all of the costs and expenses incurred by it, or any agent, employee, or representative authorized to act on the distributor's behalf in conducting its business. Respondent and the distributor agree that their relationship is that of a seller and independent buyer, and the distributor shall remain, while the agreement is in effect, an independent contractor whose own judgment and sole discretion shall control activity and movement, the means and methods of distribution, and all other matters pertaining to its business operations. Respondent has no right to require the distributor to work any specific place or time for any purpose, to devote any particular time or hours to the business, to follow any specified schedule routes, to confine or extend business to any particular retail customer, to use any specified techniques for soliciting sales or displaying merchandise, to employ or refrain from employing helpers or substitutes, to make reports to the company, to keep records other than those necessary for invoicing, etc. Respondent may, from time to time, in exercise of its sole judgment, increase or reduce the size of, replace or transfer/reassign any retail outlet to any other distributor, or otherwise change the distributor's territory, but Respondent will notify the distributor that it is considering such a revision and consult with the distributor relative to the changes that are being considered. Either party may terminate this agreement, at will, with or without cause, by giving 30 days' written notice to the other party. (Jt. Exh. 12.)

[8] The arbitration decision refers to instances in 2009, 2010, and 2011--during the life of the collective-bargaining agreement--in which Respondent sold routes serviced by unit drivers to independent distributors in which Respondent notified the Union of the decision, and the Union did not object. (Jt. Exh. 1.).

of how Respondent operated its business—a change that involved the transfer of an entire business unit (the route), including its expenses and potential revenue, to a third party. Arbitrator Paolucci held, in pertinent part:

> Absent clear contract language, it must be found that the management right to control distribution, and determine profitability allows the action of the Company. The language that the Union cites, where the parties contemplated situations where it "becomes necessary to eliminate a route or combined one with another" in Article VIII-B, must be found as supportive of this decision. The "elimination" of a route is fairly interpreted as either being elimination due to the ending or selling of a route. It would not be logical to only make the language applicable to a situation where the Company determines that the lack of profitability only necessitates the complete withdrawal from a market. The elimination provision must be given a broader interpretation and it must apply where the lack of profitability could result in either the complete withdrawal from a market, or the selling of a route thus making the route eliminated from the Company's control. This broader meeting is justified based on the Company's business practices as currently configured. Since it has over 100 distribution partners and only 80 [route sales drivers] then it follows that the parties intended the elimination provision to cover all transfers of the work from the bargaining unit member to a third party, or to the ending of the work, while the other part of the provision covers other situations where the work is merged with another route.
>
> To find otherwise would mean that the parties knew enough to address situations where a route was ended completely when the Company would withdraw from a market; and they knew enough to address situations when routes were merged; but that they lacked enough foresight to understand that routes could be sold and a route could be eliminated in that fashion. This does not follow since the Company has had third-party distributors as part of the business for some time. It is a more reasonable interpretation that they intended the two (2) instances in the provision—i.e., "elimination" or "merger" to cover all expected situations.
>
> Based on the foregoing, it must be found that the language supports the analysis above, and expressly addresses the situation of the Grievant. Her work was eliminated through the sale of the route and she was given the opportunity to bump. Her work was not subcontracted, it was unprofitable and the business was sold to third party. Based on this analysis it must be found that the company did not violate the agreement.

(R Exh. 2, pp. 20–21)

3. Collective-Bargaining Negotiations and Subsequent Route Sales

The parties' collective-bargaining agreement expired on November 17, 2012. On October 10, 2012, the parties met for their first bargaining session over a successor agreement. At the start of this session, Respondent informed the Union that it intended to sell its 29 sales routes in Columbus, Sabina, and Cincinnati, Ohio, effective November 18, 2012. (Tr. 302–303.) Respondent sold these routes to independent distributor Keystone Distributing, Ltd./ Buckeye Distributing Company because of Respondent's "dire" financial situation. The Union never demanded to bargain over the decision to sell these routes, but it did request to bargain over the effects. (Tr. 305.) The parties met for effects bargaining and later entered into an agreement in which Respondent would provide severance or modified bumping rights to the affected bargaining unit drivers.[9] (Tr. 307.) The Union never filed a grievance or an unfair labor practice charge regarding the sale of these routes.

On November 18, 2012, Respondent unilaterally implemented its last, best, and final offers to the Union, claiming the parties had reached an impasse. The Union filed an unfair labor practice charge regarding the implementation, and a hearing was held before Administrative Law Judge Geoffrey Carter on April 15–17, 2013.

On April 24, 2013, prior to a contract negotiation session, Respondent informed the Union that it intended to sell five company sales routes in Greenville, Ohio to independent distributor Earl Gaudio & Son, Inc., effective June 2013. The Union again did not request to bargain over the decision, but it did request to bargain over the effects. (Tr. 316–318.) The parties later met and the Union sought a similar arrangement to the one the parties reached when Respondent sold its routes in Columbus, Sabina, and Cincinnati. Respondent, however, was unwilling to provide severance or bumping rights to four of the five affected employees because the drivers were, in Respondent's opinion, low performers. But Respondent did agree to pay severance to the fifth affected driver. The Union never filed a grievance or an unfair labor practice charge regarding the sale of these Greenville, Ohio routes. (Tr. 320–321.)

About a month later, Gaudio's parent company filed for bankruptcy. Per the terms independent distributor agreement, the Greenville routes reverted back to Respondent immediately.[10] In July 2013, Respondent resold these Greenville routes to independent distributor Helm Distributing Company. Respondent did not provide the Union with notice that the routes had reverted back, or that they had been resold to Helms Distributing Company. (Tr. 327–331.)

On June 18, 2013, Administrative Law Judge Geoffrey Carter issued his decision finding that Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally implemented its November 18, 2012 offers to the Union without first bargaining to a good-faith impasse. Administrative Law Judge Carter found the parties were not at impasse at the time of the implementation through March 2013, in part, because the parties continued to meet and the Union continued to make conciliatory offers toward an agreement. See *Mike-Sell's Potato Chip Co.*, JD–40–13.[11]

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[9] Art. VIII-B, Sec. 5 of the collective-bargaining agreement allowed for employees to bump into other routes within their service location. However, in this case, Respondent had sold all of the routes within the employees' service location, so there were no other routes that they could bump into. As a result, the parties agreed that the affected drivers could bump into routes in other service locations. (Tr. 307.)

[10] There is no evidence introduced regarding who serviced these routes between when they reverted back to Respondent and when they were sold to Helm Distributing. (Tr. 703.)

[11] On June 13, 2013, Respondent unilaterally implemented a revised final offer. (R Exh. 3). There has been no finding, one way or another, whether the parties had reached a good-faith impasse as of the time Respondent implemented its revised final offer in June 2013. The parties agree that the issue of impasse will be addressed in the compliance proceeding related to Respondent's unlawful unilateral implementation of its November 18, 2012 final offer, and, therefore, it was not an issue litigated in this proceeding.

On July 17, 2013, Respondent provided the Union with written notification that it was selling its (four) Springfield routes to an independent distributor (Helm Distributing Company), effective August 17, 2013. (R. Exh. 8.) (Tr. 338–340.) The Union again did not make a demand to bargain over the decision to sell the routes, but it did request to bargain over the effects. Respondent and the Union did meet, and the parties ultimately agreed to provide severance or bumping rights to the affected bargaining unit drivers. (Tr. 345.) The Union did not file a grievance or an unfair labor practice charge over the sale of the Springfield routes. (Tr. 346.)

At some point in 2014, Buckeye Distributing Company filed for bankruptcy liquidation, and all 29 sales routes it had acquired in Columbus, Sabina, and Cincinnati, Ohio reverted back to Respondent, per the terms of the independent distributor agreement. (Tr. 358.) Prior to Buckeye filing for bankruptcy, Kazer testified that he was in discussions with Snyder Lance, the second largest snack food manufacturer and distributor in the country, about acquiring the routes at issue "because of the job that Buckeye was doing." (Tr. 358–359.) Kazer did not provide any more information as to what he meant by that statement. Respondent eventually transferred the 29 routes to Snyder Lance after Buckeye Distributing Company filed for bankruptcy.[12] There is no evidence Respondent notified the Union that these routes had reverted back, or that they were later transferred to Snyder Lance.

In November or December 2015, Helms Distributing Company also filed for bankruptcy, and the Greenville and Springfield routes Helm Distributing Company had acquired reverted back to Respondent. On December 15, 2015, Respondent resold those routes to an independent distributor, Big TMT Enterprize, LLC.[13] Respondent did not provide the Union with notification that the routes had reverted back, or that they were resold to Big TMT Enterprize.[14]

The parties met for bargaining over a successor agreement from October 2012 through June 2014. Thereafter, the parties met to discuss a global settlement. Those discussions continued through 2016. From October 2012 through June 2014, the parties met approximately 14 times. In those negotiations, the parties made proposals regarding the language in Art. VIII-B, Section 5, addressing bidding. Respondent sought to modify the language to: "In the event that it becomes necessary to terminate or sell a route or combine one with another, the displaced employee or employees who lose their routes due to this combination or elimination may use their seniority to bump any less senior employee within their currently assigned location." (R. Exh. 3, p. 9.) The Union sought to maintain the existing language. Respondent eventually agreed to maintain the existing language because the Union stated no change was needed. (Tr. 273–275.) In November 2016, as part of the global settlement discussions, the Union proposed inserting into the management-rights clause the following language: "Notwithstanding anything contained in this Agreement to the contrary, the Company shall not sell, transfer, or otherwise assign any current routes, in one transaction or series of transactions, to any other person or entity without the agreement of the Union." (R. Exh. 4.)

D. Alleged Unfair Labor Practices

1. April 27, 2016 Notification about Possible Sales and Resulting Grievance

On April 27, 2016, Respondent sent the Union a letter stating that in accordance with Respondent's "rights" as recognized by Arbitrator Paolucci in his decision in the Watson matter, Respondent was seriously considering the elimination of three Dayton, Ohio sales routes by selling them to independent distributors. (Jt. Exh. 3.) The letter stated that, although the specific routes ultimately eliminated will depend on the terms negotiated with the independent distributor(s), it is possible that any of the current routes may be affected, and that a final decision would be made within 3–6 months. Respondent noted that if it ultimately decided to sell one or more of these routes to independent distributors, it would provide the Union with timely notice of its decision, bargain over the effects of the route elimination(s), and that affected drivers would have seniority-based bumping rights. That same date, Respondent sent all employees a letter informing them of its plan to sell Dayton sales routes to independent distributors, and if employees were interested in becoming a distributor, they should contact the Company. (Jt. Exh. 2.) On May 6, 2016, the Union, through steward Richard Vance, filed a grievance over Respondent's announced intent to sell these three routes. (Jt. Exh. 4.) The grievance went through the various steps, and Respondent denied violating any provisions of the parties' expired agreement.

The parties had a third-step grievance meeting in June 2016. At this meeting, the Union expressed frustration that Respondent sent a letter to employees soliciting them to become distributors. (Tr. 374.) The Union also requested that Respondent not select the more senior routes to sell. Respondent informed the Union that all routes were under consideration. (Tr. 375.) Respondent stated that it had the prerogative to sell the routes under the Paolucci decision. (Tr. 151–152.) The Union did not demand to bargain over the sale of the routes because no routes had been selected at that time. (Tr. 375.)

2. Notification Regarding the Sale of Route 102

On July 11, 2016, Respondent sent the Union a letter stating that, in accordance with its "rights" as recognized by Arbitrator

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On January 15, 2014, the Board affirmed Administrative Law Judge Carter's decision. See *Mike-Sell's Potato Chip Co.*, 360 NLRB 131 (2014). Respondent appealed the Board's decision to the D.C. Circuit Court of Appeals, and the Board cross-petitioned for enforcement. On December 11, 2015, the Court of Appeals enforced the Board's order. *Mike-Sell's Potato Chip Co. v. NLRB*, 807 F.3d 318 (D.C. Cir. 2015). This enforced Board order is the subject of the previously mentioned compliance proceeding.

[12] The former Buckeye Distributing Company employees continued to service the routes between when they revered back to Respondent and when they were sold to Snyder Lance. (Tr. 701.) There is no other evidence in the record regarding the terms or conditions associated with having these individuals continue to service the routes during this period of time.

[13] The former Helm Distributing Company employees continued to service the routes between when they revered back to Respondent and when they were sold to Big TMT Enterprize, LLC. (Tr. 700). There is no other evidence in the record regarding the terms or conditions associated with having these individuals continue to service the routes during this period of time.

[14] Respondent contends that the Union, through its steward Richard Vance, should have been aware that these routes were resold because Big TMT Enterprize temporarily worked out of Respondent's Dayton distribution center where Vance and other bargaining unit employees worked, and Vance and the others likely would have seen Big TMT Enterprize employees loading their trucks. (Tr. 356–357). I find, however, Respondent failed to present sufficient evidence to establish the Union had actual or constructive notice.

Paolucci in his decision in the Watson matter, Respondent will be selling Route 102, Xenia territory, effective July 24, 2016. (Jt. Exh. 5.) The unit driver assigned to the route had announced his retirement. The Union did not file a new grievance after receiving this notification. Vance testified he believed that his May 6, 2016 grievance covered this particular sale. The Union never demanded to bargain over this sale or its effects. The route was eventually sold to Big TMT Enterprize, LLC. (Tr. 375.)

3. Notification Regarding the Sales of Routes 104 and 122

On August 29, 2016, Respondent sent the Union a letter stating that in accordance with its "rights" as recognized by Arbitrator Paolucci in his decision in the Watson matter, Respondent will be eliminating two positions through the sale of Route 104 and Route 122, effective September 4, 2016. (Jt. Exh. 6.) Respondent noted that the affected drivers (Gerald Shimmer #122 and Jerry Lake #104) would have an opportunity to rebid on September 1, 2016. On September 29, 2016, the Union, through steward Richard Vance, filed a grievance regarding the sale of these two routes. The parties met on this grievance at the various steps, and Respondent again denied committing any violations of the parties expired agreement.

On around August 30, 2016, Gerald Shimmer, one of the affected drivers, informed Vance that he was told that his delivery vehicle was being sold, and that he (Shimmer) needed to unload his truck and use a spare vehicle for the last few days of his route. (Tr. 114–115.)

The two routes were eventually sold to BLM Distributing, LLC. (Tr. 382.) The owner of BLM Distributing is Lisa Krupp. Krupp is a former unit driver that provided relief coverage when the other unit drivers were on vacation or leave.

4. Union's Demand to Bargain and Information Request

In addition to the grievance, on August 31, 2016, the Union, through Business Representative Alan Weeks, sent Respondent a letter disputing Respondent's claim that the Paolucci arbitration decision gave it the right to sell Routes 104 and 122. (Jt. Exh. 8.) Specifically, the Union argued that Arbitrator Paolucci found no obligation to bargain because of the demonstrated unprofitability of the Watson route, the fact that the Watson route was far away from the Columbus, Ohio distribution center increasing the cost of providing product to the route, and the fact that similar unprofitable routes have been sold in the past. In contrast, the Union argued that no information has been provided to the Union showing that Routes 104 and 122 were unprofitable; the two routes at issue are within the Dayton, Ohio area and providing product did not cost more than providing product to any other route out of the Dayton distribution center; and Respondent has not previously sold a route within the Dayton service area. Based on these factors, the Union demanded Respondent meet and bargain over the decision to sell Routes 104 and 122. In order to be prepared for such bargaining, the Union requested the following information:

> 1. All documents that demonstrate the profitability of all of the Company's routes for the period from September 1, 2014 through August 1, 2016 so comparison can be made as to the profitability of all the routes on Route No. 104 and Route No. 122.
> 2. A copy of the agreement between Mike-Sell's and the entity to whom Route No. 104 and Route No. 122 is scheduled to be sold.
> 3. A description of how Mike-Sell's product is to be received by the entity to whom [R]oute No. 104 and Route No. 122 is scheduled to be sold.
> 4. A copy of all correspondence, including electronic correspondence, between Mike-Sell's and the entity to whom Route No. 104 and Route No. 122 is scheduled to be sold from the date of the first such correspondence until August 29, 2016.

The Union concluded the letter by requesting that Respondent delay the sale of the two routes until the Union had an opportunity to review the requested information and the parties met for bargaining. (Jt. Exh. 8.)

On September 12, 2016, Respondent sent a reply to the Union's August 31, 2016 letter. (Jt. Exh. 9.) In its reply letter, Respondent disagreed with the Union's interpretation of the Paolucci arbitration decision, arguing that the Union was reading the decision too narrowly, particularly that it only applied to the sale of unprofitable routes. Respondent noted that the Arbitrator "specifically rejected the Union's argument 'that the Company did this simply because the costs were too high,' finding instead that '[w]here an entire business unit is transferred, the factors justifying the change are much more numerous than a simple measure of cost savings.'" In short, Respondent argued that the Arbitrator "recognized that [t]he Company has chosen a different manner of operating its business, and [a]bsent clear contract language, it must be found that the management right to control distribution, and determine profitability, allows the [Company to sell its routes to independent distributors without bargaining with the Union.]" (internal quotations omitted). Respondent went on to say that it exercised its "inherent management right" to determine methods of distribution by selling Routes 104 and 122, just as it did by selling Route 102 in July 2016. The last paragraph of Respondent's letter states:

> Because Arbitrator Paolucci's award makes it clear that Mike-Sells has the management right to change distribution methods in accordance with strategic objectives, we respectfully decline to bargain over our decision to sell Company routes; to delay the sale of Routes 104 and 102 pending such decisional bargaining; or to respond to information request designated specifically for the purpose of engaging in such decisional bargaining.

In a footnote, Respondent stated it remained willing to bargain over the effects of the route eliminations, if any, and remained willing to provide relevant information for that purpose. But because the arbitration award confirmed that Respondent had the managerial discretion to unilaterally sell company routes, it is not a mandatory subject of bargaining; therefore, Respondent did not believe that the Union's August 31 information request (which was made for the purpose of decisional bargaining) was presumptively relevant or necessary for the Union to perform its statutory duties. Respondent did not provide the Union with the information it requested. (Tr. 475.)

5. Notification of Sale of Route 131 and Resulting Grievance

Also, on September 12, 2016, Respondent sent the Union a separate letter stating that in accordance with its "rights" as recognized by Arbitrator Paolucci in his decision in the Watson matter, Respondent will be selling Route 131, effective September 17, 2016. (Jt. Exh. 10.) On that same date, the Union,

through steward Richard Vance, filed a grievance regarding the sale of Route 131. The route was eventually sold to Big TMT Enterprize, LLC. The parties later met on these and other grievances in January 2017, and Respondent denied any violations of the parties' expired collective-bargaining agreement.[15]

6. Sale of Delivery Vehicles to Independent Distributors

On September 4, 2016, Respondent sold a delivery truck to independent distributor Lisa Krupp's company BLM Distributing LLC. On September 11, 2016, Respondent sold a delivery truck to independent distributor Charles Morris's company Big TMT Enterprize, LLC. (Tr. 222.) There was no grievance filed regarding the sale of the vehicles.

7. Costs and Revenue Associated with Sales

At the hearing, Kazer estimated that Respondent recognized approximately $229,000 in total savings in labor costs from selling the routes (i.e., $152,000 in commissions, $35,000 in pension contributions, $14,000 in vacation pay, holiday pay and sick day pay, $13,000 in employment taxes, $7,000 in healthcare costs, $6,000 in workers' compensation payments, and $1,100 in supplemental life insurance payments). He estimated approximately $195,000 worth of nonlabor savings, including the elimination two nonunion positions; the costs associated with maintaining and insuring the four vehicles that were sold; costs of stale products; etc. Kazer also identified several intangible cost savings. He also identified Respondent received $74,000 from selling the routes and $34,000 from selling the trucks to the independent distributors, and $18,000 in inventory liquidation. However, Kazer noted that the sale of the four routes meant paying the independent distributors $324,000 in distributor margins. (Tr. 538–542.)

IV. CONTENTIONS OF THE PARTIES

The General Counsel contends that Respondent's decisions to sell the four company routes at issue to independent distributors amounts to subcontracting of bargaining unit work, which is a mandatory subject of bargaining, and Respondent's failure or refusal to bargain with the Union over those decisions violated Section 8(a)(5) and (1) of the Act. The General Counsel also contends that the information the Union requested from Respondent on August 31, 2016, was relevant and necessary for the Union's role as collective-bargaining representative, and that Respondent's failure or refusal to provide that requested information violated Section 8(a)(5) and (1) of the Act.

Respondent denies the alleged violations. Respondent contends selling the company sales routes was not a mandatory subject of bargaining because it was part of Respondent's decision to fundamentally change its business model by discontinuing these discrete business units. Moreover, even if the sales were a mandatory subject of bargaining, Respondent contends that the Union waived its right to bargain. And because there was obligation to bargain over the sales, Respondent argues it had no obligation to provide the Union with the requested information.

V. LEGAL ANALYSIS

A. Decisions to Sell the Routes Were Mandatory Subjects of Bargaining.

Section 8(d) of the Act imposes an obligation on an employer to bargain with respect to wages, hours, and other terms and conditions of employment. Section 8(a)(5) makes it an unfair labor practice for an employer to make unilateral changes to these mandatory subjects without first providing the union with notice and an opportunity to bargain. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). The issue, therefore, is whether Respondent's decision to sell the four company routes at issue amounted to a mandatory subject of bargaining.

In *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 215 (1964), the Supreme Court found that an employer's subcontracting of maintenance work to a third party was a mandatory subject of bargaining, holding that:

> The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.

379 U.S. at 213–214.

In *First National Maintenance Corp. v, NLRB*, 452 U.S. 666 (1981), the Supreme Court held that not all decisions that result in the displacement of employees require bargaining. In that case, the employer provided maintenance and housekeeping services for commercial establishments, including a nursing home. Under the service contract, the home reimbursed the employer for its labor costs and paid a fixed management fee. The employer terminated its contract with the home over a dispute about the management fee, which led it to discharge its employees working there without bargaining with the union. In deciding the matter, the Court divided management decisions into three categories for bargaining purposes. First, "[s]ome management decisions, such as choice of advertising and promotion, product type and design, and financing arrangements, have only an indirect and attenuated impact on the employment relationship" and are thus not mandatory subjects of bargaining. Second, "[o]ther management decisions, such as the order of succession of layoffs and recalls, production quotas, and work rules, are almost exclusively 'an aspect of the relationship' between employer and employee" and are thus mandatory subjects. 452 U.S. at 677. Third, a decision that had a direct impact on employment because it involves the elimination of jobs, but which had as its focus only the economic profitability of the contract, a matter wholly apart from the employment relationship. The Court stated that the employer's decision to terminate its contract with the home involved a change in the scope and direction of the enterprise and was akin to a decision whether to be in business at all, "not in [itself] primarily about conditions of employment." 452 U.S. at 677, quoting from *Fibreboard*, 379 U.S. 203, at 223 (1964) (Stewart, J. concurring). In determining whether there is a bargaining obligation in this third category, the Court set forth the following test:

[15] Respondent participates in the Union's Central States Pension Fund. As a participant in this Fund, Respondent is subject to a withdrawal liability of $20 million if the number of contribution based units (CBUs) drops below a certain amount. Kazer testified that Respondent has not sold more routes out of concern that further sales would trigger the withdrawal liability. (Tr. 579.)

> [I]n view of an employer's need for unencumbered decision making, bargaining over management's decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.

First National Maintenance, 452 U.S. at 678–679.

The Court noted that the employer had no intention of replacing the discharged employees or to moving the operation elsewhere, that the sole purpose for the closing was to reduce economic loss, and that the employer's decision was based on a factor over which the union had no control or authority. As such, the employer's only obligation was to bargain over the effects of the decision. The Court, however, was careful to clarify that its holding was limited to the particular situation presented and was not intended to cover other types of management decisions, such as "plant relocations, sales, other kinds of subcontracting, automation, etc., which are to be considered on their particular facts." Id. at 686 fn. 22.

In *Bob's Big Boy Family Restaurants*, 264 NLRB 1369, 1370 (1982), the dispute was over whether a change should be characterized as a mandatory subcontracting decision under *Fibreboard*, or as a non-mandatory partial closing under *First National Maintenance*. In that case, the employer operated a commissary where it prepared and distributed food products to a restaurant chain. Without bargaining with the union, the employer decided to discontinue its shrimp processing operation and subcontract that work to a third party, which resulted in the termination of 12 employees. The Board, in a 3-2 decision, held:

> The distinction between subcontracting and partial closing, however, is not always readily apparent. Thus, it is incumbent on the Board to review the particular facts presented in each case to determine whether the employer's action involves an aspect of the employer/employee relationship that is amenable to resolution through bargaining with the union since it involves issues "particularly suitable for resolution within the collective bargaining framework." If so, Respondent will be required to bargain over its decision. If, however, the employer action is one that is not suitable for resolution through collective bargaining because it represents "a significant change in operations," or a decision lying at "the very core of entrepreneurial control," the decision will not fall within the scope of the employer's mandatory bargaining obligation. A determination of the suitability to collective bargaining, of course, requires a case-by-case analysis of such factors as the nature of the employer's business before and after the action taken, the extent of capital expenditures, the bases for the action, and, in general, the ability of the union to engage in meaningful bargaining in view of the employer's situation and objectives.

Id. at 1370 (internal citations omitted).

The Board concluded the employer subcontracted the work of shrimp processing, rather than partially closed its food preparation business, because there was no major shift in the direction of employer's business. The Board found that, both before and after the subcontract, the employer engaged in the business of providing prepared foodstuffs to its various stores, and it appeared to continue supplying processed shrimp to its constituent restaurants. The only difference is that the processing work was performed by the third-party's employees pursuant to the subcontract rather than by employer's employees. Accordingly, the Board held that the nature and direction of the employer's business was not substantially altered by the subcontract.

The Board also observed that the closure did not constitute a major capital modification. Although the corporation did sell $30,000 worth of equipment to the third party, this was not so substantial a change as to remove the decision from mandatory bargaining. Finally, the Board held that since escalating costs and proper size grading of the shrimp were the primary reasons for the employer's decision to subcontract, the employer's concerns were of the type traditionally suitable for the collective bargaining process. Thus, the Board found its decision was consistent with *First National Maintenance* as well as *Fibreboard*.

In *Dubuque Packing Co.*, 303 NLRB 386, 391 (1991), enfd. in relevant part 1 F.3d 24, 31–33 (D.C. Cir. 1993), the Board set forth the test it would use to apply the Court's *First National Maintenance* decision for determining whether a work relocation decision is a mandatory subject of bargaining. Under this test, the General Counsel has the initial burden of showing that the decision was "unaccompanied by a basic change in the nature of the employer's operation." The employer then has the burden of rebutting the General Counsel's prima facie case or proving certain affirmative defenses. Where the Board concludes that the employer's decision concerned the "scope and direction of the enterprise," there will be no duty to bargain over the decision. The Employer may also avoid bargaining if it can show that (1) labor costs were not a factor or (2) even if labor costs were a factor, the union, could not have offered sufficient labor cost concessions to alter its work relocation decision. Id. at 391. Although *Dubuque* concerned work relocation decisions, the test is applicable to decisions that have a direct impact on employment, but, have as their focus the economic profitability of the employing enterprise.

In *Torrington Industries*, 307 NLRB 809 (1992), the employer unilaterally replaced two union truck drivers with non-bargaining unit drivers and independent contractors, but claimed that its decision was entrepreneurial and did not turn on labor costs. The Board concluded that the *Dubuque Packing* test did not apply because the employer's reasons had nothing to do with a change in the scope and direction of its business. Instead, the Board concluded that the case involved subcontracting decisions similar to those in *Fibreboard*, and, therefore, were mandatory subjects of bargaining, even though the decision was not motivated by labor costs.

In *O.G.S. Technologies, Inc*., 356 NLRB 642, 645 (2011), a successor employer unilaterally subcontracted die-cutting work, resulting in the replacement of its own die engineers by outside firms. The Board applied *Torrington* and concluded the employer's termination of a portion of its operation constituted subcontracting that required decisional and effects bargaining, holding:

> In contrast to *First National Maintenance*, OGS made certain operational changes, but they did not amount to a 'partial closing' or other 'change in the scope and direction of the en-

> terprise,' which remained devoted to the manufacture and sale of brass buttons to the same range of customers. Before and after the decision to subcontract die cutting, OGS produced and supplied brass buttons to customers. . . . The decision at issue simply resulted in a marginal increase in the percentage of cutting work the [r]espondent subcontracted and a modest change in the functions performed in-house, but not the abandonment of a line of business or even the contraction of the existing business.

Id.

In *Mi Pueblo Foods*, 360 NLRB 1097 (2014), the employer operated a chain of grocery stores and a distribution center. The distribution center employees would load food shipments and grocery items onto trucks, and then unit drivers would deliver them to the employer's stores. The employer used a third-party trucking company to deliver products from certain suppliers to the distribution center, where the products would be unloaded and reloaded onto the employer's trucks for the unit drivers to deliver to the stores. Later, in an effort to increase productivity and efficiency, the employer began having the third-party trucking company deliver the supplies directly to certain stores, bypassing the distribution center and the unit drivers. The union representing the drivers filed a charge alleging the employer had an obligation to bargain over the subcontracting of this work. The Board held that the employer had an obligation to bargain over the decision and the effects of changing from a hub-and-spoke delivery model to a point-to-point model even though that change "did not result in layoffs or significantly affect wages and hours." The Board held that whenever bargaining unit work is assigned to outside contractors, the unit is adversely affected, and there is an obligation to bargain, because absent an obligation to bargain, an employer "could continue freely to subcontract work and not only potentially reduce the bargaining unit but also dilute the [u]nion's bargaining strength." 360 NLRB at 1099.

In light of the foregoing, the core question is whether the scope and direction of Respondent's business was substantially altered when it sold the four company sales routes at issue to the independent distributors. I find it was not. Respondent has been, and continues to be, a manufacturer *and* distributor of snack foods. It has two distribution methods: direct store delivery and warehouse or direct sales. The direct store delivery method is effectuated by the use of company route sales drivers and independent distributors. Although the percentage of routes covered route sales drivers versus independent distributors has changed over the years, Respondent continues to use both to distribute its products to its customers. As for the four routes at issue, Respondent continues to distribute products to those customers. The only difference is that independent distributors are delivering the products on those routes rather than the company route sales drivers.

Under *Fibreboard*, the issue is whether the employer is replacing existing employees with those of an independent contractor to do the same work under similar conditions. In this case, that is what Respondent has done. Respondent contends that, unlike company route sales drivers, independent distributors make significant investment in purchasing their territory, acquiring, maintaining, and insuring storage space, vehicles, equipment, and purchasing product; and these independent distributors assume sizable risk that they will be able to sell the products they buy and have a profitable business. However, at its core, both groups are responsible for delivering Respondent's products to its customers. Both groups acquire or are assigned a route or territory. Both of the groups review orders, load the products onto their vehicles, travel to customer locations, stock customer shelves, rotate unsold product, perform point-of-sale marketing, and removing expired product. Both use handheld electronic devices to track orders, deliveries, and sales. And both are primarily paid based on what they sell.[16] There clearly are differences between the two, but *Fibreboard* refers to *similar* conditions, not identical ones. And despite the differences, I find that the independent distributors perform the same core work under similar conditions as the route sales drivers. As a result, based on established precedent, I find the sales of these four company routes in 2016 are akin to subcontracting, and, therefore, are mandatory subjects of bargaining.

Respondent contends it has no obligation to bargain because while labor costs were a factor in deciding to sell the routes, it actually costs Respondent more to use independent distributors because their margins. But because I conclude that there was no actual change in Respondent's operations, and labor costs played a role in Respondent's decision to sell the routes, Respondent had an obligation to bargain over the decision to sell the four routes at issue.

Respondent cites to *West Virginia Baking Co.*, 299 NLRB 306 (1990), enfd. 946 F.2d 1563 (D.C. Cir. 1991), for support that it did not have an obligation to bargain over its decision to sell the company routes. In that case, the administrative law judge dismissed the complaint, including the allegations the employer violated Section 8(a)(5) and (1) of the Act when it unilaterally converted all its bargaining unit driver-salesmen to independent distributors after bargaining to an impasse with the union. The judge found that the decision to convert all the unit drivers to independent distributors was not a mandatory subject of bargaining. On appeal, the Board held:

> We agree with the judge's conclusion that the Respondent did not refuse to bargain in good faith over the decision to convert its driver-salesmen to independent distributors and the effects of that decision *and, in fact, did bargain in good faith over the decision and its effects until impasse and lawful implementation of the distributorship program*. Accordingly, we find it unnecessary to pass on whether the Respondent's decision to convert its driver-salesmen to independent distributors is a mandatory or permissive subject of bargaining.

299 NLRB at 306 fn. 3 (italics added).

I find this case to be inapposite. To begin with, the employer sought to completely eliminate all of its driver-salesmen and convert them to independent distributors. It then met and bargained with the union over its decision and its effects. After the parties reached an impasse, the employer implemented the change. As stated above, the Board chose not to address whether the employer's conversion decision was a mandatory subject of bargaining.

Respondent also cites to *NLRB v. Adams Dairy*, 350 F.2d 108 (8th Cir. 1965), cert. denied 382 U.S. 1011 (1965), for support. In that case, the Court of Appeals denied enforcement of the Board's decision in *Adams Dairy*, 137 NLRB 815

[16] Under the parties' agreement, route sales drivers are paid a flat rate for route riding and pull up (stocking) work. Otherwise, they are paid a commission. (Jt. Exh. 1, pg. 7.)

(1962), in which the administrative law judge and the Board concluded that the employer violated Section 8(a)(5) and (1) of the Act when it had independent distributors take over the driver-salesmen routes, without giving the Union prior notice or an opportunity to bargain. I am bound by Board law and cannot rely upon the reasoning of the Court of Appeals for not enforcing the Board's order. Even were that not true, I find the case to be inapposite because the employer completely eliminated all driver-salesmen routes and sold all of its trucks. In the present case, Respondent continues to employ company route sales drivers and possess trucks, and, based on Kazer's testimony, it likely will continue to employ route sales drivers out of concern that to do otherwise would trigger significant pension withdrawal liability. (Tr. 581-582).

B. The Union Did Not Waive its Right to Bargain Over the Decision to Sell Routes 102 or 131 by Failing to Request Bargaining.

An employer violates Section 8(a)(5) when it unilaterally institutes changes in mandatory terms of employment without bargaining in good faith. *NLRB v. Katz*, 369 U.S. at 743. In general, good-faith bargaining requires timely notice and a meaningful opportunity to bargain regarding a proposed change. See *Wackenhut Corp.*, 345 NLRB 850, 868 (2005); *Brimar Corp.*, 334 NLRB 1035, 1035 (2010). Once notice is received, the union must act with "due diligence" to request bargaining, or risk a finding that it has waived its bargaining right. See *KGTV*, 355 NLRB 1283 (2010). A union may be excused from requesting to bargain if the employer's notice provides too little time for negotiation before implementation, or if the employer otherwise has made it clear that it has no intention of bargaining about the issue. In these circumstances, a bargaining request would be futile, because the employer's notice informs the union of nothing more than a fait accompli. In order to determine whether the employer has presented the union with a fait accompli, the Board considers objective evidence regarding the presentation of the proposed change and the employer's decision-making process. Id. (union's "subjective impression of its bargaining partner's intention is insufficient" to establish fait accompli). While presenting a proposed change as a fully formulated plan or the use of positive language does not definitively establish a fait accompli, statements conveying an irrevocable decision constitute significant evidence that bargaining would be futile. *UAW-DaimlerChrysler National Training Center*, 341 NLRB 431, 433 (2004) (employer presented fait accompli by telling union that layoff was a ""done deal"); *Pontiac Osteopathic Hospital*, 336 NLRB at 1023–1024 (notice stating that changes "will be implemented" and other "unequivocal language" evidence of fait accompli). The Board also evaluates the timing of the employer's statements vis-a-vis the actual implementation of the change, the manner in which the change is presented, and other evidence pertinent to the existence of a "fixed intent" to make the change at issue which obviates the possibility of meaningful bargaining. *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983) *Northwest Airport Inn*, 359 NLRB 690, 693 (2013) (fait accompli established given owner's testimony that a decision to subcontract bargaining unit work had already been made and implemented, and union bargaining proposals regarding employee compensation "made no difference").

As previously stated, on April 27, 2016, Respondent sent the Union a letter stating that, in accordance with Respondent's rights as recognized by Arbitrator Paolucci in his decision in the Watson matter, Respondent was seriously considering the elimination of three Dayton, Ohio sales routes by selling them to independent distributors. The letter stated that *a final decision* would be made within 3–6 months. Respondent noted that if it ultimately decided to sell one or more of these routes to independent distributors, it would provide the Union with timely notice of its decision, bargain over the effects of the route elimination(s), and that affected drivers would have seniority-based bumping rights. At the June 2016 third-step grievance meeting over the Union's May 2016 grievance, Respondent informed the Union that it had the right to make the sales under the Paolucci decision. On July 11, 2016, Respondent sent the Union a letter stating that it will be selling Route 102, Xenia territory, effective July 24, 2016. There is no dispute the Union took no action after it received Respondent's July 11 letter notifying it of the sale of Route 102. Respondent contends that the Union's failure to request bargaining over the sale of the route amounts to a waiver of it right to bargain. The General Counsel counters, arguing that the Union had no obligation to request bargaining because Respondent announced the sale of Route 102 as a fait accompli.

I find the combination of Respondent's April 27 and on July 11 letters amounted to a notice of a fait accompli. Respondent's April 27 letter to the Union stated that in accordance with its rights, it would make a "final decision" within 3–6 months, and Respondent would notify the Union of that decision and "bargain over the effects of the route elimination(s)." *Sutter Health Central Valley Region*, 362 NLRB No. 199, slip op. at 3 (2015)(fait accompli when the announcement or notification is presented as a "final decision"). As promised, on July 11, Respondent notified the Union of its final decision to sell Route 102, which would be effective on July 24, 2016. The only reasonable reading of these letters is that Respondent had no intention of bargaining with the Union regarding the decision to sell these routes; only that it would be willing to bargain over the effects. This conclusion is further supported by Respondent's September 12, 2016 response to the Union's August 31, 2016 request to bargain over the decisions to sell Routes 104 and 122, when Respondent stated that, per the Arbitration decision, it had no obligation to bargain with the Union over the sale of these routes. Consequently, under these circumstances, I find that the Union's failure to request bargaining over the sale of Route 102 does not constitute a waiver of its right to bargain.

Similarly, I find the Union did not waive its right to bargain over the sale of Route 131 by failing to make a request to bargain after receiving notice of that decision to sell. Respondent provided the Union with notice of that sale the same day it provided its reasoning as to why it did not have an obligation to bargain over the sale of Routes 104 and 122. Based on that information, I find Respondent announced the sale of Route 131 as a fait accompli because it had a fixed intent and was not willing to bargain over the decision.

C. The Union Did Not "Clearly and Unmistakably" Waive Its Right to Bargain Over the 2016 Decision to Sell of the Four Company Routes.

Respondent contends that the Union has waived its right to bargain over the sale of company routes. An employer may escape liability for a unilateral change if it proves that a union has expressed or implied a "clear and unmistakable waiver" of

its right to bargain. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *Provena St. Joseph Medical Center*, 350 NLRB 808, 810–812 (2007). A waiver occurs when a union knowingly and voluntarily relinquishes its right to bargain about a term and condition of employment and cedes full discretion to the employer on such a matter. However, the Board narrowly construes waivers and has been hesitant to imply waivers not explicitly mentioned in the parties' collective-bargaining agreements. *Mississippi Power Co.*, 332 NLRB 530 (2000), enfd. in part 284 F.3d 605 (5th Cir. 2002) (rejecting employer's waiver argument that the unions incorporated the benefit plans' reservation of rights clauses into the contract based on a "course of conduct" of copies of the benefit plans provided to the unions and incorporated into the collective-bargaining agreements). A clear and unmistakable waiver can be gleaned from the parties' past practice, bargaining history, prior action or inaction. *American Diamond Tool*, 306 NLRB 570 (1992). However, Board precedent makes clear that a union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time. *Owens-Brockway Plastic Products*, 311 NLRB 519, 526 (1993). The burden is on the party asserting the waiver to establish the existence of the waiver. *Pertec Computer*, 284 NLRB 810 fn. 2 (1987).

Respondent initially contends that it had no obligation to bargain because it had an inherent right, separate from the expired agreement, to make these decisions to sell routes. I have already addressed and rejected that argument. Respondent also indirectly relies upon the language of the parties' expired collective-bargaining agreement, and the arbitration decision in the Watson matter, as supporting its waiver argument.[17] As previously stated, the parties' agreement does not address the subcontracting of bargaining unit work. Arbitrator Paolucci acknowledged this in his decision. He concluded that the sale of the company route was permitted under the management-rights clause, which allowed Respondent the discretion to control distribution methods. However, the Board consistently has held that a waiver of bargaining rights under a management-rights clause does not survive the expiration of a contract. *Buck Creek Coal*, 310 NLRB 1240 (1993); *Control Services*, 303 NLRB 481 (1991), enfd. 975 F.2d 1551 (3d Cir. 1992), enfd. 961 F.2d 1568 (3d Cir. 1992); *Kendall College of Art*, 288 NLRB 1205, 1212 (1988).

Regardless, a waiver of a statutory bargaining right must be "clear and unmistakable" and will not be inferred from general contract language. *Provena St. Joseph Medical Center*, supra; *Control Services*, supra. The contract language falls well short of this standard. It makes no reference to the period beyond the contract's expiration, and fails to unequivocally and specifically express an intention to permit the Respondent to continue implementing unilateral changes of this sort after contract expiration. *The American Red Cross, Great Lakes Blood Services Region and Mid-Michigan Chapter*, 364 NLRB No. 98, slip op. at 4 (2016).

Respondent further argues that the Union waived its right to bargain by the past practice that has developed as a result of the Union's failure to object to or demand bargaining over the sales of company routes to independent distributors prior to 2016. To establish a past practice of subcontracting justifying a refusal to bargain, an employer must show that the previous subcontracting was similar in kind and degree and occurred with such regularity and frequency that employees could reasonably expect the practice to continue or recur on a regular and consistent basis. A history of subcontracting on a random, intermittent, or discretionary basis is insufficient. *Hospital San Cristobal*, 358 NLRB 769, 772 (2012), reaffd. 363 NLRB No. 164 (2016); *Ampersand Publishing, LLC*, 358 NLRB 1415, 1416 (2012), reaffd. 362 NLRB No. 26 (2015); and *Sociedad Espanola de Auilio Mutuo y Beneficiencia de P.R.*, 342 NLRB 458, 468–469 (2004), enfd. 414 F.3d 158, 165–167 (1st Cir. 2005). See also *E. I. du Pont de Nemours*, 364 NLRB No. 113 (2016).

In *E. I. du Pont de Nemours*, 364 NLRB No. 113 (2016), the Board, upon remand from the D.C. Circuit Court of Appeals, reexamined whether the employer violated Section 8(a)(5) and (1) of the Act by unilaterally changing the terms of the employees' benefit plan at its facilities post contract expiration at a time when the parties were negotiating for successor agreements and were not at impasse. The Board, pursuant to the Court's remand instructions, returned to the rule it followed in its earlier decisions, including *Beverly Health & Rehabilitation Services*, 335 NLRB 635 (2001), enfd. in relevant part 317 F.3d 316 (D.C. Cir. 2003), and *Register-Guard*, 339 NLRB 353 (2003), that discretionary unilateral changes ostensibly made pursuant to a past practice developed under an expired management-rights clause are unlawful. The majority overruled precedent, including the Board's decisions in the *Courier-Journal* cases, 342 NLRB 1093 (2004) and 342 NLRB 1148 (2004), *Capitol Ford*, 343 NLRB 1058 (2004), and *Beverly Health & Rehabilitation Services*, 346 NLRB 1319 (2006), to the extent that those Board decisions conflicted with well-settled waiver principles, and were inconsistent with the Act's goal to encourage the practice of collective bargaining.

Applying the status quo doctrine under *NLRB v. Katz*, supra, the Board held that during negotiations for a successor agreement, the employer has a statutory duty to maintain the status quo by continuing in effect the employment terms and conditions that existed at the expiration of the parties' agreement. Id. slip op. at 4. But because the essence of a management-rights clause is the union's consensual surrender of its statutory right to bargain during the term of the contract, that waiver, like any waiver of a statutory right, does not survive contract expiration, absent evidence of the parties' contrary intent. Thus, the status quo doctrine under *Katz* does not privilege the employer to continue making unilateral changes that, during the term of the agreement, would have been authorized by the now-expired management-rights clause. Id., slip op. at 5. And, because unilateral changes implemented during the term of a contract under the authority of a management-rights clause are based on a union's bargaining waiver, the right granted to an employer to make changes to employees' terms of employment under that clause does not create a past practice permitting an employer to continue to unilaterally implement changes post contract expiration. Id., slip op. at 5–6.

Having overruled the *Courier-Journal* decisions and *Capitol Ford*, the majority found that the employer's wide ranging and

[17] At the hearing Respondent cited to its June 2013 revised final offer and its modified language addressing bidding rights. Respondent argued that, under either the prior language or revised language, the Union waived its right to bargain over the sale of company routes. However, in its communications with the Union announcing these sales, Respondent never cited to or relied upon the modified bidding language in its June 2013 revised final offer to support its unilateral action. Respondent, instead, repeatedly relied solely upon Arbitrator Paolucci's decision—and the language that existed then--to support its action.

varied changes to the benefits of unit employees, made with no cognizable fixed criteria, did not establish a past practice that the employer was permitted to continue when the applicable collective-bargaining agreements had expired. Therefore, the majority held that following the expiration of the parties' collective-bargaining agreements, the employer had the statutory obligation to adhere to the terms and conditions of employment that existed on the expiration date until it bargained to agreement or reached a good-faith impasse in overall bargaining for a new agreement.

Applying these principles to the instant case, I find that Respondent cannot rely upon its prior, unilateral decisions to sell company routes to independent distributors, both before and after the expiration of the parties' agreement, as establishing a waiver of the Union's right to request bargaining over the sale of the four company routes at issue. As established in all the letters Respondent sent to the Union announcing its intent to sell the routes, as well as its response to the Union's August 2016 demand to bargain, Respondent relied upon Arbitrator Paolucci's decision, which found Respondent had the right sell company routes based on the language of the now expired management-rights clause.[18]

Relying on Arbitrator Paolucci's decision, Respondent argues that Article VIII-B, Section 5, which sets forth employees' bidding rights when a route is eliminated or merged, supports finding a waiver. Arbitrator Paolucci held the "elimination provision must be given a broader interpretation and it must apply where the lack of profitability could result in either the complete withdrawal from a market, or the selling of a route thus making the route eliminated from the Company's control." To begin with, I am not bound by an arbitrator's decision. *Spielberg Manufacturing Co.*, 112 NLRB 1080, 1081 (1955). And, in this case, I do not agree with the Arbitrator's interpretation or reasoning. Article VIII-B, Section 5 does not give Respondent the right to unilaterally sell routes, and it does not constitute a clear and unmistakable waiver of the Union's right to bargain. The provision addresses bidding rights in the event routes are eliminated or merged. However, when Respondent sells a route to an independent distributor, it is not eliminated—it continues to exist. It merely is being serviced by an independent distributor, as opposed to a unit driver.

Moreover, Respondent argues these sales to independent distributors involve the transfer of a discrete business unit. But, according to the independent distributor agreement, Respondent is transferring a primary, not exclusive, right to distribute its products within a defined territory, and the distributor has certain rights and obligations regarding servicing of that territory. And, if the distributor is unable to service that route, it reverts back to Respondent. This occurred on three separate occasions following the expiration of the parties' collective-bargaining agreement, when the independent distributors went bankrupt.[19]

The result is there is no provision, other than the management-rights clause, that arguably gives Respondent the authority to subcontract work by selling routes. Absent some other contractual provision waiving the Union's right to bargain over the subcontracting of unit work through the sale of the route to an independent distributor, the default, or the status quo, is the statutory obligation to bargain over those decisions.

Respondent points to the numerous routes it sold prior to and after the expiration of the collective-bargaining agreement to support its waiver argument. However, as stated above, the Board has held that prior changes, made with no cognizable fixed criteria, do not establish a past practice that the employer was permitted to continue post-contract expiration, even if earlier changes also occurred during contract hiatuses pursuant to the expired management rights provision. *E. I. du Pont de Nemours*, supra. In this case, there were no set criteria used to decide which routes to sell. Kazer testified the decisions to sell were based on what routes the distributors wanted to buy and whether Respondent believed that they could handle the routes.[20]

Regardless, I find that Respondent's waiver arguments, whether based on the management-rights clause in the expired contract, the arbitration decision which relied upon the management-rights clause, or the past practice that developed pursuant to the management-rights clause or arbitration decision, all fail under current Board precedent. As such, I find Respondent had a statutory obligation to bargain with the Union over the decision to sell the four routes at issue, and its failure to do so violates Section 8(a)(5) and (1) of the Act.

[18] Respondent argues that Arbitrator Paolucci recognized that Respondent had an "inherent management right" to sell company routes. I reject that argument. The Arbitrator stated that "[a]bsent clear contract language, it must be found that the management right to control distribution, and determine profitability allows the action of the Company." The management-rights provision of the expired agreement states that the "right to improve manufacturing methods, operations and conditions and distribution of its products . . . is exclusively reserved to the company." I find that Arbitrator Paolucci was relying upon this language as giving Respondent the right to sell the route in that case, and he was not concluding that there was some extra-contractual right. See generally *Weavexx, LLC*, 364 NLRB No. 141, slip op. 3 (2016); and *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, enfd. 722 F.2d 1120, 1126 (1983) ("The arbitrator's conclusion that an extra-contractual residual rights theory authorizes management to make unilateral decisions on mandatory subjects of collective bargaining not specifically covered in a collective bargaining agreement disregards clear Board precedent.").

[19] As previously stated, prior to Buckeye filing for bankruptcy, Kazer testified that he was in discussions with Snyder Lance, the second largest snack food manufacturer and distributor in the country, about Buckeye's 29 sales routes in Columbus, Sabina, and Cincinnati, Ohio. Kazer explained that he contacted Snyder Lance about taking over these routes "because of the job that Buckeye was doing." (Tr. 358–359). Kazer did not provide any more information as to what he meant by that statement; however, it suggests that Respondent retains certain control and authority over routes that are sold to independent distributors to ensure that the routes are being properly handled.

[20] The General Counsel and the Union further argue that the Union's failure to demand bargaining over the prior sales does not constitute waiver because the 2016 sales were different, largely because they were located in and around Dayton, and Respondent had not sold Dayton routes in the past. The Union asserts that Routes 102, 104, 122, and 131 were some of the more profitable routes, unlike the routes sold in the past. The Union believes that part of the reason these routes were more profitable was because of their proximity to the Dayton distribution center, which reduced the transportation costs associated with those routes, as compared to the other routes sold that were located in outlying areas. The General Counsel and the Union argue that because of these differences, and the fact that Respondent never sold Dayton routes before, the Union's failure to bargain over the other routes is irrelevant to whether they clearly and unmistakably waived the routes at issue. I need not address this contention, because I have concluded Respondent has failed to establish a clear and unmistakable waiver.

D. Respondent Had an Obligation to Provide the Union with the Information Requested on August 31, 2016

The General Counsel contends that Respondent had an obligation to provide the Union with the information it requested on August 31 related to the sales of routes at issue. It is well settled that an employer's duty to bargain collectively under Section 8(a)(5) of the Act includes the duty to supply requested information to a union that is the collective-bargaining representative of the employer's employees if the requested information is relevant and reasonably necessary to the union's performance of its responsibilities. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). This duty is not limited to contract negotiations but extends to requests made during the term of the contract for information relevant to and necessary for contract administration and grievance processing. *Beth Abraham Health Services*, 332 NLRB 1234 (2000). The standard for determining the relevancy of requested information is a liberal one and it is necessary only to establish "the probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." Id. at 437. See also *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982), and cases cited therein. Therefore, the information must have some bearing on the issue between the parties but does not have to be dispositive. *Kaleida Health, Inc.*, 356 NLRB 1373, 1377 (2011).

Where the union's request is for information pertaining to employees in the bargaining unit, that information is presumptively relevant and the Respondent must provide the information. However, where the information requested is not presumptively relevant to the union's performance as the collective-bargaining representative, the burden is on the union to demonstrate the relevance of the information requested. *Disneyland Park*, 350 NLRB 1256, 1257–1258 (2007). Where the requested information pertains to matters outside the bargaining unit and is not presumptively relevant, the information must be provided if the surrounding circumstances put the employer on notice as to the relevance of the information or if the union shows why the information is relevant. *National Extrusion & Mfg. Co.*, 357 NLRB 127 (2011). Where a showing of relevance is required because the request concerns non-unit matters, the burden is "not exceptionally heavy." *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994). This burden is satisfied when the union demonstrates a reasonable belief, supported by objective evidence, that the requested information is relevant. *Disneyland Park*, supra at 1258.

The Board has held that information requested pertaining to subcontracting agreements, even if it relates to the bargaining unit employees' terms and conditions of employment, is not presumptively relevant, and therefore a union seeking such information must demonstrate its relevance. *Disneyland Park*, supra at 1258. Specifically, on the subject of subcontracting situations, the Board in Disneyland Park held that a broad, discovery-type standard is utilized by the Board in determining the relevance of requested information, and that potential or probable relevance is sufficient to give rise to an employer's obligation to provide information. Id. In that regard, in *Disneyland Park*, the Board held that to demonstrate relevance, the General Counsel must present evidence either (1) that the union demonstrated relevance of the non-unit information, or (2) that the relevance of the information should have been apparent to the employer under the circumstances. *Disneyland Park*, supra at 1258; Absent such a showing, the employer is not obligated to provide such requested information. The Board has also held that "[t]he union's explanation of relevance must be made with some precision; and a generalized, conclusory explanation is insufficient to trigger an obligation to supply information." *Disneyland Park*, supra at 1258 fn. 5; *Island Creek Coal*, 292 NLRB 480, 490 fn. 19 (1989); see also *Schrock Cabinet Co*., 339 NLRB 182 fn. 6 (2003).

In its August 31 letter demanding to bargain, the Union disputed Respondent's claims that Arbitrator Paolucci's decision gave it the authority to sell the routes at issue. The Union distinguished that case from the known facts about the routes at issue. The Union stated in this letter that in order facilitate bargaining, particularly in light of Respondent's reliance on the past arbitration decision which largely hinged on route profitability, the Union requested the following: (1) All documents that demonstrate the profitability of all of the Company's routes for the period from September 1, 2014 through August 1, 2016 so comparison can be made as to the profitability of all the routes on Route No. 104 and Route No. 122; (2) A copy of the agreement between Mike-Sell's and the entity to whom Route No. 104 and Route No. 122 is scheduled to be sold; (3) A description of how Mike-Sell's product is to be received by the entity to whom [R]oute No. 104 and Route No. 122 is scheduled to be sold; and (4) A copy of all correspondence, including electronic correspondence, between Mike-Sell's in the entity to whom Route No. 104 and Route No. 122 is scheduled to be sold from the date of the first such correspondence until August 29, 2016. Based on the wording of the letter, and the context in which it was sent, I find that the Union demonstrated the relevance of the information request, or that the relevance of the information should have been apparent under the circumstances. As such, Respondent's failure to provide the requested information violates Section 8(a)(5) and (1) of the Act.

E. The Allegation That Respondent Failed to Bargain with the Union Regarding the Sale of the Company Vehicles to the Independent Distributors is Either Abandoned or Barred by Section 10(b) of the Act

At the hearing, the General Counsel amended the complaint to include allegations that Respondent violated Section 8(a)(5) and (1) of the Act when it sold the delivery trucks to independent distributors. The parties entered into stipulations limiting this allegation to Respondent's sale of a delivery truck to independent distributor Lisa Krupp's company BLM Distributing LLC on around September 4, 2016; and Respondent's sale of a delivery truck to independent distributor Charles Morris's company Big TMT Enterprize, LLC on September 11, 2016. (Tr. 222.)

An employer has a duty to bargain with the representative of its employees prior to making any changes in wages, hours or other working conditions if the change is a "material, substantial and a significant" one affecting the bargaining unit's terms and conditions of employment, and the General Counsel bears the burden of establishing that the change was material, substantial and significant. *Central Telephone Co. of Texas*, 343 NLRB 987, 1000 (2004). In this case, the Counsel for General Counsel completely failed to address this allegation in her posthearing brief. Similarly, the Union failed to present any argument or authority in support of this allegation. Thus, the allegation appears to have been abandoned. In any event, the

General Counsel failed to carry the burden of proof and persuasion.

Even if the General Counsel had established the sales to be unlawful, there is the issue of whether the allegation was timely. As indicated above, Respondent contends the allegation over the sale of the vehicles is barred under Section 10(b) of the Act. Section 10(b) of the Act provides, in pertinent part, "[t]hat no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." It is well established that the 10(b) limitations period does not begin to run "until the charging party is on 'clear and unequivocal notice,' either actual or constructive, of a violation of the Act." *Ohio and Vicinity Regional Council of Carpenters (The Schaefer Group, Inc.)*, 344 NLRB 366, 367 (2005) (citation omitted). Under this standard, adequate notice will be found where the conduct was sufficiently "open and obvious to provide clear notice" to the charging party. *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004), enfd. sub nom. *East Bay Automotive Council v. NLRB*, 483 F.3d 628 (9th Cir. 2007)), or where the charging party was "on notice of facts that reasonably engendered suspicion that an unfair labor practice had occurred," and could have discovered the violation by exercising reasonable diligence. *Phoenix Transit System*, 335 NLRB 1263 fn. 2 (2001). See also *St. George Warehouse*, 341 NLRB 905, 905 (2004) ("In determining whether a party was on constructive notice, the inquiry is whether that party should have become aware of a violation in the exercise of reasonable diligence."). Respondent, in this case, shoulders the burden in establishing this affirmative defense. *Broadway Volkswagen*, supra.

On August 29, 2016, Respondent sent the Union a letter stating that Respondent will be eliminating two positions through the sale of Route 104 and Route 122, effective September 4, 2016. Respondent noted that the affected drivers (Gerald Shimmer #122 and Jerry Lake #104) would have an opportunity to rebid on September 1, 2016. On August 30, 2016, Gerald Shimmer informed union steward Rick Vance that he was told that his delivery vehicle was being sold, and that he (Shimmer) needed to unload his truck and use a spare vehicle for the last few days of his route. (Tr. 114115). I find the timing of these notifications was sufficient to put the Union "on notice of facts that reasonably engendered suspicion that an unfair labor practice had occurred" and that the Union could have discovered whether there had been a violation "by exercising reasonable diligence." Despite this notification, the Union failed to exercise reasonable diligence to determine whether the sale of this vehicle, or any other vehicles, at or around the time these two routes were sold constituted a violation. Consequently, I find that the allegation was filed more than 6 months after the Union had constructive notice of the alleged violations, and, therefore, should be dismissed as untimely.

CONCLUSIONS OF LAW

1. Respondent, Mike-Sell's Potato Chip Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, International Brotherhood of Teamsters (IBT), General Truck Drivers, Warehousemen, Helpers, Sales and Service, and Casino Employees, Teamsters Local Union No. 957, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the certified collective-bargaining representative for the following unit of Respondent's employees:

> [A]ll Sales Drivers, and Extra Sales Drivers at [Respondent's] Dayton Plant, Sales Division and at [Respondent's] Sales Branch in Cincinnati, Columbus, Greenville, Sabina and Springfield, Ohio and all over the road drivers employed by [Respondent], but excluding all supervisors, security guards, and office clerical employees employed by [Respondent].

4. Respondent has violated Section 8(a)(5) and (1) of the Act since July 2016 by failing to give the Union notice and an opportunity to bargain about its decision to unilaterally subcontract bargaining unit work to others outside the bargaining unit; and by failing to provide the Union information requested on August 31, 2016, that is relevant and necessary to its role as collective-bargaining representative.

5. By this conduct Respondent has engaged in unfair labor practices affecting commerce within the meaning Section 2(6) and (7) of the Act.

6.Respondent has not violated the Act except as set forth above.

7.I recommend dismissing that portion of the amended complaint which alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by failing or refusing to bargain with the Union before unilaterally selling the delivery vehicles.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it is ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Affirmatively, Respondent shall, upon request from the Union, rescind the sales of Routes 102, 104, 122, and 131. Respondent shall, upon request, bargain with the Union regarding the decision to subcontract or sell company sales routes. Respondent shall make any employees whole, with interest, for any loss of earnings resulting from Respondent's unilateral subcontracting of bargaining unit work associated with the sale of Routes 102, 104, 122, and 131 to independent distributors. The Respondent will compensate employees for any adverse tax consequences for receiving lump-sum backpay awards by payment to each employee of the amount of excess tax liability owed, and will file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee. The Respondent shall provide the Union with the information requested in its August 31, 2016 information request.

Respondent shall post an appropriate informational notice, as described in the attached Appendix. This notice shall be posted at the Respondent's Dayton facility wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since July 11, 2016. When the notice is issued to Respondent, it shall sign it or otherwise notify Region 9 of the Board what action it

will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[21]

ORDER

Respondent, Mike-Sell's Potato Chip Company, at its Dayton, Ohio facilities, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to bargain with Union is the designated collective-bargaining representative of the following bargaining unit of the employees regarding their wages, hours, and other terms and conditions of employment:

> [A]ll Sales Drivers, and Extra Sales Drivers at [Respondent's] Dayton Plant, Sales Division and at [Respondent's] Sales Branch in Cincinnati, Columbus, Greenville, Sabina and Springfield, Ohio and all over the road drivers employed by [Respondent], but excluding all supervisors, security guards, and office clerical employees employed by [Respondent].

(b) Making unilateral changes to wages, hours, or other terms and conditions of employment of the bargaining unit employees without first providing the Union with notice and an opportunity to bargain, including, but not limited to, the subcontracting of bargaining unit work through the sale of company sales routes.

(c) Failing or refusing to provide the Union with requested information, such as the Information requested in the Union's August 31, 2016 information request that is relevant and necessary to the Union's role as collective-bargaining representative.

(d) In any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Provide the Union with notice and an opportunity to bargain before unilaterally making changes to wages, hours, or other terms and conditions of employment of bargaining unit employees, including, but not limited to, the subcontracting of bargaining unit work through the sale of company sales routes.

(b) Upon request from the Union, rescind the sales of Routes 102, 104, 122, and 131 to independent distributors.

(c) Make affected employees whole, with interest, for any loss of earnings resulting from the subcontracting of unit work through the sale of Routes 102, 104, 122, and 131 to independent distributor, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

(d) Compensate affected employees for any adverse tax consequences for receiving lump-sum backpay awards by payment to each employee of the amount of excess tax liability, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(e) Within 14 days after service by the Region, post at its facilities in Dayton, Ohio copies of the attached notice marked Appendix A.[21] Copies of the notice, on forms provided by the Regional Director for Region 9 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places throughout its Dayton, Ohio facility, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has closed certain facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 11, 2016.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 25, 2017.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT fail or refuse to bargain in good faith with International Brotherhood of Teamsters (IBT), General Truck Drivers, Warehousemen, Helpers, Sales, and Service, and Casino Employees, Teamsters Local Union No. 957 (Union) as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

> All sales drivers, and extra sales drivers at the [Respondent's] Dayton Plant, Sales Division and at the [Respondent's] Sales Branch in Cincinnati, Columbus, Greenville, Sabina and Springfield, Ohio and all over-the-road drivers employed by

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the [Respondent], but excluding all supervisors, security guards, and office clerical employees employed by the [Respondent].

WE WILL NOT refuse to meet and bargain in good faith with your Union over any proposed changes in wages, hours, and working conditions before putting such changes into effect.

WE WILL NOT change your terms and conditions of employment by unilaterally selling our routes without notification to the Union or affording the Union an opportunity to bargain regarding these decisions.

WE WILL NOT refuse to provide the Union with information that is relevant and necessary to its representational duties.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL upon request, bargain in good faith with the Union as the exclusive collective-bargaining representative of our unit employees about the sale of Routes 102, 104, 122 and #131.

WE WILL if requested by the Union, rescind the sales of our Ohio Routes 102, 104, 122, and 131 that we made without bargaining with the Union and assign those routes to unit employees.

WE WILL pay you for the wages and other benefits lost because of the sales of our Ohio Routes 102, 104, 122, and 131 that we made without bargaining with the Union, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed by agreement, a report allocation the backpay award to the appropriate calendar year(s).

WE WILL promptly furnish the Union with the following information requested in its August 29, 2016 information request letter: (1) documents showing the profitability of Respondent's routes for the period September 1, 2014 through August 1, 2016, so a comparison could be made between all of the routes to Routes 104 and 122; (2) a copy of the agreement between Respondent and the entity who is scheduled to purchase these routes; (3) a description of how Respondent's product is to be received by the entities purchasing these routes; and, (4) a copy of all correspondence between Respondent and the entity who is scheduled to purchase these routes.

MIKE-SELL'S POTATO CHIP COMPANY

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/09-CA-184215 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E. Washington D.C. 20570, or by calling (202) 273-1940.

Linda Finch, Esq., for the General Counsel.
Jennifer Bame and *Jennifer Asbrock, Esqs.,* for the Respondent.
John R. Doll, Esq., for the Charging Party.

SUPPLEMENTAL DECISION

I. INTRODUCTION[1]

ANDREW S. GOLLIN, Administrative Law Judge. On July 25, 2017, I issued a decision in the above-referenced matter ("Initial Decision") finding that Mike-sell's Potato Chip Company ("Respondent") violated Section 8(a)(5) and (1) of the National Labor Relations Act ("Act") by: (1) failing or refusing to bargain with the International Brotherhood of Teamsters (IBT), General Truck Drivers, Warehousemen, Helpers, Sales and Service, and Casino Employees, Teamsters Local Union No. 957 ("Union" or "Charging Party") about the sale of four company sales routes to independent distributors, and (2) by refusing to provide the Union with requested information related to two of the routes sold. In finding the violations, I rejected the Respondent's defense that, assuming the sale of the routes at issue was a mandatory subject of bargaining, its decision was consistent with its past practice of selling routes to independent distributors. Citing *E.I. du Pont de Nemours*, 364 NLRB No. 113 (2016) ("*DuPont 2016"*), I reasoned that Respondent could not rely upon its prior unilateral sales of company sales routes both before and after the expiration of the parties' collective-bargaining agreement to establish a waiver of the Union's right to bargain over the four sales at issue in 2016.

On December 17, 2017, the Board issued its decision in *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017), in which the Board overruled *DuPont 2016* (and the precedent upon which that holding relied) and held that an employer's established past practice constitutes a term and condition of employment that permits the employer to take actions unilaterally that do not materially vary in kind or degree from that past practice, regardless of the circumstances under which that practice developed.

On August 2, 2018, the Board remanded my Initial Decision in light of *Raytheon* for further consideration. 366 NLRB No. 143 (2018). On August 3, 2018, I issued an order inviting the parties to submit their positions on whether to reopen the record to submit new evidence in light of the *Raytheon* decision. On August 23, 2018, Respondent filed a motion to reopen the rec-

[1] References to the initial and supplemental transcript record will be designated as ("Tr." and "Supp. Tr."); references to Joint Exhibits will be designated as ("Jt. Exhs."); references to General Counsel's Exhibits at the initial and supplemental hearings will be designated as ("G.C. Exh." and "Supp. GC Exh."); references to the Charging Party's Exhibits at the initial and supplemental hearings will be designated as ("CP Exh." and "Supp. CP Exh."); and references to Respondent's Exhibits at the initial and supplemental hearings will be designated as ("R. Exh."), with the exhibits offered during the supplemental hearing beginning with R. Exh. 44.

ord to offer additional evidence on its alternative defense that, assuming the decision to sell a company sales route is a mandatory subject of bargaining, the four sales at issue were consistent with its established past practice of unilaterally eliminating routes by selling them to independent distributors. On September 7, 2018, the General Counsel and the Charging Party filed oppositions to Respondent's motion. On October 1, 2018, I issued an order granting Respondent's motion and scheduled a supplemental hearing to allow the parties to present new evidence of instances (prior to 2016) in which Respondent sold a company sales route (i.e., one operated by a unit driver at the time of sale) to an independent distributor. The supplemental hearing occurred on November 19, 2018, in Cincinnati, Ohio. Thereafter, Respondent, the Charging Party, and the General Counsel filed post-hearing briefs, which I have carefully considered.[2]

The following incorporates and supplements the findings and conclusions contained in my Initial Decision.[3]

II. *RAYTHEON* DECISION

In *Raytheon*, the company operated a manufacturing facility in Fort Wayne, Indiana where it employed about 35 production and maintenance employees in a bargaining unit represented by the Steelworkers Union. In 1999, the company implemented a nationwide comprehensive "cafeteria-style" benefit plan called the Raytheon Unified Benefits Program ("Raytheon Plan") for its supervisory and non-union employees. Thereafter, when the company and the Steelworkers negotiated a successor collective-bargaining agreement, they agreed to make coverage under the Raytheon Plan available to the unit employees. Beginning in January 2001, and through 2012, the unit employees received coverage under the Raytheon Plan on the same basis as was offered to the company's non-unit employees. Raytheon Plan documents provide that "the Company reserves the absolute right to amend the plan and any or all Benefit Programs incorporated [therein] from time to time, including, but not limited to, the right to reduce or eliminate benefits," and the parties' collective-bargaining agreements incorporated this right. The relevant collective-bargaining agreements also included provisions stating that the company "reserves the right to amend or terminate said Group Benefit Plans," and that "[a]ll benefits . . . are subject in every respect to the terms of the applicable Plan documents under which payment is claimed."

Every fall from 2001 to 2011, the company notified participating employees of upcoming modifications to the Raytheon Plan, including changes to benefits, premiums, deductibles, and copayments, which would be effective January of the following year. Each of those years, the company made changes to the Plan, such as increasing premiums for health insurance and/or altering available benefits, medical options, deductibles, and copayments. The Steelworkers never objected to or sought to bargain over any of these changes. There is no dispute that the modifications were authorized by the collective-bargaining agreements and Plan documents referenced therein.

The parties' 2009–2012 agreement was set to expire on April 29, 2012. In February 2012, the Steelworkers informed the company that it wanted to open negotiations and schedule bargaining sessions for a successor contract. During the negotiations that followed, the Steelworkers submitted proposals to change contract provisions granting the company the right to make annual changes to unit employees' health insurance. One such proposal was to strike the "pass through" language in the expiring contract and to require that the Raytheon Plan benefits (and other benefits) offered to the unit employees remain the same for the duration of the contract. The Steelworkers also stated that it was no longer willing to waive its right to bargain over a mandatory subject of bargaining, such as health benefits. The company rejected the Steelworkers' proposals. The contract eventually expired, but the parties continued to negotiate. During a post-expiration negotiating session, the Steelworkers inquired whether the unit employees would be asked to participate in the upcoming enrollment period for the Raytheon Plan, and the company informed the Union that open enrollment was about to commence and that it would proceed as planned for all employees based on the company's belief that this was required by the terms of the expired contract. The Steelworkers asked the company to exclude the unit employees from the enrollment, and the company refused. On January 1, 2013, the company, over the objection of the union, implemented changes to the Raytheon Plan that affected the unit employees.

The union filed an unfair labor practice charge, and a complaint issued alleging that the company's announcement and implementation of the 2013 changes to the Raytheon Plan violated Section 8(a)(5) of the Act. The judge found the 2013 modifications constituted a change to mandatory subjects which required notice and an opportunity to bargain, even though the modifications were consistent with the company's preexisting practice of making annual changes in each of the preceding ten years.

The Board, in a 3-2 decision, reversed the judge and dismissed the complaint. In so doing, the majority overruled *DuPont 2016*, where the Board held that, when evaluating whether actions constitute a "change," parties may not simply compare those actions to past actions, but must look at whether the past unilateral actions were privileged by an existing collective-bargaining agreement that was no longer in effect. According to *DuPont 2016,* if the contractual basis for the unilateral change was no longer in effect, the employer's continued unilateral action constitutes a "change" even if it consistent with the employer's past practice. The *DuPont 2016* majority also held that, if the employer's past and present actions involved any "discretion," any exercise of that discretion was always a "unilateral change" requiring that the employer provide the union with advance notice and the opportunity for bargaining.

[2] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific citations, but rather on my review and consideration of the entire record from both the initial and supplemental hearings. The findings of fact are a compilation of credible testimony and other evidence, as well as logical inferences drawn therefrom. To the extent testimony contradicts with the findings herein, such testimony has been discredited, either as having been in conflict with credited testimony or other evidence, or because it was incredible and unworthy of belief.

[3] Prior to the commencement of the supplemental hearing, the parties discussed but could not agree on certain factual stipulations. Respondent later attempted to introduce the document containing the proposed factual stipulations to show what had been discussed by the parties. I rejected the exhibit, and I maintain that ruling as Respondent has failed to establish relevance. At the hearing, Respondent did not withdraw the exhibit or request it be placed in the rejected exhibit file. Following the hearing, Respondent's counsel sent correspondence requesting that the document be placed in the rejected exhibit file. There was no objection to this request. As a result, the document has been placed in the rejected exhibit file as Rej. R. Exh. 54.

In *Raytheon*, the Board majority held that *DuPont 2016* was inconsistent with the Supreme Court's decision in *NLRB v. Katz*, 369 U.S. 736 (1962), and that:

> Henceforth, regardless of the circumstances under which a past practice developed—i.e., whether or not the past practice developed under a collective-bargaining agreement containing a management-rights clause authorizing unilateral employer action—an employer's past practice constitutes a term and condition of employment that permits the employer to take actions unilaterally that do not materially vary in kind or degree from what has been customary in the past.

365 NLRB No. 161, slip op. at 16.

The *Raytheon* majority, however, was careful to point out that *Katz* does not permit employers to evade their duty to bargain under Section 8(d) and 8(a)(5) of the Act:

> Even though employers, under *Katz*, have the right to take unilateral actions where it can be seen that those actions are not a substantial departure from past practice, employers still have an obligation to bargain upon request with respect to all mandatory bargaining subjects—including actions the employer has the right to take unilaterally—whenever the union requests such bargaining. The Act imposes two types of bargaining obligations upon employers: (1) the *Katz* duty to refrain from making a unilateral "change" in any employment term constituting a mandatory bargaining subject, which entails an evaluation of past practice to determine whether a "change" would occur if the employer took the contemplated action; and (2) the duty to engage in bargaining regarding any and all mandatory bargaining subjects upon the union's request to bargain. Existing law makes it clear that this duty to bargain upon request is not affected by an employer's past practice.

Id., slip op. at 11 (internal footnotes omitted).

Thus, an employer remains obligated to bargain *upon request* even where unilateral action is permitted under a past practice:

> Even if an employer has taken actions involving wages or other employment terms in precisely the same way, the existence of such a past practice does not permit the employer to refuse to bargain over the subject if requested to do so by the union. In other words, even though *Katz* permits the employer to take unilateral actions to the extent they are consistent with past practice and therefore not a "change," the employer must engage in bargaining regarding those actions whenever the union requests such bargaining, unless an exception to the duty to bargain applies—e.g., unless the union has waived bargaining over the subject contractually or bargaining over the subject has already occurred.

Id. (internal citations omitted).

In applying the new standard, the *Raytheon* majority concluded the company's post-expiration changes maintained the status quo created by its prior changes, and, therefore, were not unlawful. It found the company had an established past practice of unilaterally implementing the announced changes in January of every year from 2001 to 2012, and those changes included, without exception, increases in premiums, changes in available benefits, medical options, deductibles, and copayments. 365 NLRB No. 161, slip op. at 18. It also held the changes were not random or lacking definable criteria, but rather were all "typical of the changes one regularly sees from year to year in cafeteria-style benefit plans." Id. Finally, it held the changes at issue did not materially vary in kind or degree from the changes made in prior years. Id.

However, in reaching its conclusion, the majority noted the allegations were litigated solely under a *Katz* "unilateral change" theory, and not under a "refusal to bargain" theory. Id., slip op. at 19, fn. 88. Also, because the company's benefit changes did not alter the status quo, and, therefore, did not require notice and an opportunity to bargain before implementation, the majority held it was not necessary to reach the question of whether the Steelworkers had waived its right to bargain. Id., slip op. at 2, fn. 3.

III. ANALYSIS POST *RAYTHEON*

As stated, in my Initial Decision, I found Respondent violated Section 8(a)(5) and (1) of the Act by failing or refusing to bargain with the Union about the decision to sell Routes 102, 104, 122, and 131 to independent distributors, and by refusing to provide the Union with requested information related to Routes 104 and 121. I concluded the decisions to sell these company sales routes during the hiatus period constituted changes over which Respondent had an obligation to provide the Union with prior notice and opportunity to bargain, and Respondent failed to establish that the Union waived its right to bargain over these decisions. Thereafter, the Board remanded my Initial Decision to reexamine my findings and conclusions in light of *Raytheon*.[4] As stated, *Raytheon* set forth the standard to apply when determining whether a unilateral action constitutes a change or the mere continuation of an established past practice.

A. Route 102

1. Background and Allegation

On April 27, 2016, Respondent sent the Union a letter stating it was seriously considering the elimination of three Dayton, Ohio sales routes by selling them to independent distributors. (Jt. Exh. 3). Respondent noted that if it ultimately decided to sell one or more of these routes to independent distributors, it would provide the Union with timely notice of its decision, bargain over the effects of the route elimination(s), and accord affected drivers with seniority based bumping rights. On May 6, 2016, the Union, through steward Richard Vance, filed a grievance over Respondent's announced intent to sell these routes. (Jt. Exh. 4). Respondent denied violating any provisions of the parties' expired agreement and stated that it had the

[4] At the time of my Initial Decision, there was pending the compliance proceedings over the Board's Order, reported at 360 NLRB 131 (2014), finding that Respondent had violated Section 8(a)(5) and (1) of the Act when it unilaterally implemented its bargaining proposals in November 2012, after prematurely declaring that the parties were at an impasse in their negotiations for a successor agreement. The compliance hearing has since occurred, and Administrative Law Judge David I. Goldman issued his supplemental (compliance) decision, which the Board affirmed, as reported at 366 NLRB No. 29 (2018).

prerogative to sell the routes under the Paolucci decision. (Tr. 151–152). The Union made no demand to bargain because no routes had been selected at that time. (Tr. 375).

On July 11, 2016, Respondent sent the Union a letter stating that, in accordance with its "rights" as recognized in the Paolucci decision, Respondent will be selling Route 102 (Xenia, Ohio territory), effective July 24, 2016. (Jt. Exh. 5).[5] The unit driver assigned to the route had announced his retirement. The Union did not file a new grievance after receiving this notification because Vance believed his May 6, 2016 grievance already covered this particular sale. The Union did not make a demand to bargain over the sale of Route 102, or its effects.

Paragraph 6 of the amended complaint alleges that Respondent unilaterally sold Route 102 to an independent distributor without affording the Union an opportunity to bargain over the decision and/or without first bargaining with the Union to an overall good-faith impasse, in violation of Section 8(a)(5) and (1) of the Act. In my Initial Decision, I found that the sale was a change to a mandatory subject of bargaining, and the Union's failure to request bargaining over this change was excused because Respondent presented the sale to the Union as a fait accompli. I further found the Union did not waive its right to bargain over the change.

2. Legal Standard

Under *Raytheon*, where, as here, the employer is alleged to have committed a unilateral change to a mandatory subject of bargaining, the issue is whether the employer's action amounted to a change or the mere continuation of the status quo. To prove the latter, the evidence must prove that: (1) the employer has an established past practice of the unilateral action at issue; and (2) the action at issue did not materially vary in kind or degree from that established past practice. The Board has held the burden of proof is on the party asserting the existence of a past practice. *Catapillar Inc*, 355 NLRB 521, 522 (2010) (quoting *Sunoco, Inc*., 349 NLRB 240, 244 (2007)). To meet this burden, the party must show the prior action was similar in kind and degree and occurred with such regularity and frequency that employees could reasonably expect the practice to continue or recur on a regular and consistent basis. Id. See also *Consolidated Communication Holding, Inc*., 366 NLRB No. 152 (2018); *Hospital San Cristobal*, 358 NLRB 769, 772 (2012), reaffd. 363 NLRB No. 164 (2016); and *Ampersand Publishing, LLC*, 358 NLRB 1415, 1416 (2012), reaffd. 362 NLRB No. 26 (2015).[6]

3. Prior Transfers of Company Sales Routes

The purpose of the supplemental hearing was to allow Respondent the opportunity to present evidence of prior unilateral sales of company sales routes to independent distributors sufficient to meet its burden under *Raytheon*. Respondent provided evidence of sales between 1998 and 2013.

In the late 1980s, Respondent had 10 distribution centers in Ohio (Dayton, Columbus, Cincinnati, Springfield, Sabina, Greenville, Versailles, Hamersville, Portsmouth, and New Paris).[7] (Supp. Tr. 36-37). Respondent has since closed all but the Dayton distribution center. In 1998 or 1999, Respondent closed its Hamersville distribution center. (Supp. Tr. 44-45). Former human resource manager, Barry Wilson, who retired in 2006, testified about this closure and the two company sales routes that operated out of that location. One route was sold to an unidentified independent distributor and the other was transferred (along with the unit driver who performed it) to the Cincinnati distribution center. (Supp. Tr. 46-48). According to Wilson, Respondent took these actions because it was not profitable to continue operating these routes out of the Hamersville location. (Supp. Tr. 91-92). Wilson believed Respondent notified the Union regarding the sale. (Supp. Tr. 50).[8] Wilson "[did] not recall" Respondent bargaining with the Union over this sale, or if the Union filed a grievance or an unfair labor practice charge over it. (Supp. Tr. 51). There was no other evidence introduced regarding this sale.

In 2002, Respondent elected to close its Portsmouth distribution center because, according to Wilson, it "was not making money for the company." (Supp. Tr. 52). Respondent notified the Union that it was closing the center and eliminating its four company sales routes. (Supp. Tr. 72-73). The parties engaged in effects bargaining and negotiated a severance package for the affected unit drivers. (Supp. Tr. 54-56). The agreement states that "[b]oth parties regret that the current distribution arrangement in the Portsmouth Market is unworkable because of high operating costs and low sales base." (R. Exh. 47). The agreement also states, "If the employee elects to leave the company, the following compensation will be provided, with the understanding that the company reserves the right to service any/all customers in the Portsmouth market by alternative means/methods." Id. At some later point, Respondent entered into an independent distributor agreement with Ken Bartley (a former zone manager) for a geographic territory that overlapped with portions of the four eliminated routes.[9] (Supp. Tr.

[5] The four routes operated out of the Dayton distribution center. The cities and their approximate distances from Dayton, Ohio are: Middletown (25 miles), Springboro (16 miles), Xenia and Bellbrook (15 miles), and Beavercreek (9 miles). I take judicial notice of this geographical information. Fed. R. Evid. 201; *United States v. Johnson*, 726 F.2d 1018, 1021 (4th Cir. 1984) ("geographical information is especially appropriate for judicial notice.")

[6] I n overruling *DuPont 2016*, the *Raytheon* majority held it was restoring "the correct analysis to this area" as reflected in cases such as *Shell Oil,* 149 NLRB 283, 287 (1964) and *Westinghouse Electric Corp. (Mansfield Plant)*, 150 NLRB 1574, 1577 (1965). In *Shell Oil*, the Board found the company's "frequently invoked practice of contracting out occasional maintenance work on a unilateral basis, while predicated upon observance and implementation of [the agreement], had also become an established employment practice and, as such, a term and condition of employment." 149 NLRB at 287. In *Westinghouse Electric Corp.*, which also involved subcontracting, the Board held there was "no departure from the norm in the letting out of the thousands of contracts to which the complaint is addressed. The making of such contracts was but a recurrent event in a familiar pattern comporting with [the employer's] usual method of conducting its manufacturing operations … It does not appear that the subcontracting engaged in during the period in question materially varied in kind or degree from that which had been customary in the past." 150 NLRB at 1576.

[7] The transcript incorrectly spells Hamersville as "Hammersville." Those errors are hereby corrected.

[8] Wilson testified that it "would have been" vice president of marketing Nat Chandler that notified the Union. (Supp. Tr. 75-76). But Wilson acknowledged he was not present for any conversation with the Union regarding the closure or the sale of the route. (Supp. Tr. 89-91).

[9] Initially, Wilson testified the routes were sold to an independent distributor. (Supp. Tr. 52-53). Later, on cross-examination, he testified they were not sold, but rather "eliminated," and the company later sold "a certain area" that included portions of the four eliminated routes to an independent distributor. (Supp. Tr. 70; 103). Respondent's zone manager, Mark Plummer, testified the four routes were sold. (Supp. Tr. 127-129). I credit Wilson that the four routes were eliminated as opposed to sold. I found Wilson had a more honest and forthright de-

105-106; 129). Respondent notified the Union that it entered into this agreement. The Union made no request to bargain over the decision to eliminate the routes or to later sell territory covering portions of those routes to an independent distributor. It also never filed a grievance, an unfair labor practice charge, or an information request. (Supp. Tr. 129-130).

In September 2006, Respondent sold its Muncie, Indiana (Route 335) company sales route. (Supp. Tr. 131). This sale occurred after Christy Hensall, the unit driver, quit. Respondent posted the route for bid, but no one bid to take over her route. (Supp. Tr. 133-134). Respondent eventually sold the route and the van used to service the route to independent distributor Francis Distributing. (R. Exh. 48). Respondent notified the Union steward about the sale. (Supp. Tr. 135-137). The Union did not request to bargain over the decision to sell the route, and it never filed a grievance, an unfair labor practice charge, or an information request. (Supp. Tr. 138). There was no bargaining over effects because no unit employee was affected by the sale. (Supp. Tr. 135).

In early 2009, Respondent sold the Mansfield, Ohio company sales route to independent distributor Snyder's of Berlin. (Supp. Tr. 136-137). The displaced unit driver, Nancy Higginbotham, was offered the opportunity to bump into a route out of the Columbus distribution center, but she declined and chose to resign. Respondent notified the Union steward about the sale. The Union made no request to bargain over the decision to sell the route, and it never filed a grievance, an unfair labor practice charge, or an information request. (Supp. Tr. 138).

In late 2009, Respondent sold its Newark/Granville/Zanesville and its Lancaster/Hocking Hills/Athens company sales routes to independent distributor Ohio Citrus. (Supp. Tr. 138-139) (R. Exh. 49). Those routes had been serviced by unit drivers Patrick Kenny and Jim Philippi. (Supp. Tr. 180). Kenny bumped into another route; Philippi resigned. Respondent notified the Union steward about the sale. The Union made no request to bargain, and it never filed a grievance, an unfair labor practice charge, or an information request. (Supp. Tr. 140-141).

In late 2010, Ohio Citrus "returned" the two routes it bought the year before. (Supp. Tr. 141-142). After the Newark/Granville/Zanesville route reverted back to Respondent, it was assigned to a unit driver (Ronnie Page) to perform. (Supp. Tr. 142). The Lancaster/Hocking Hills/Athens route reverted back to Respondent and it was later resold to independent distributor Snyder's of Berlin in around July 2011. (Supp. Tr. 142). There is no evidence whether this reverted route was (re)assigned to, or performed by, a unit driver between when it reverted back and when it was resold.

Snyder's of Berlin later returned the Mansfield route and the Lancaster/Hocking Hills/Athens route. (Supp. Tr. 144-145). Respondent abandoned the Mansfield route and all but the Lancaster portion of the Lancaster/Hocking Hills/Athens route. (Supp. Tr. 145). The Lancaster portion was added to the Lexington route already assigned to a unit driver. (Supp. Tr. 182). The record does not address if Respondent provided the Union with notice that it was abandoning portions of these routes, but the Union made no request to bargain, and it never filed a grievance, an unfair labor practice charge, or an information request. Additionally, there was no bargaining over effects because there were no unit employees handling (portions of) these routes when they reverted back and were abandoned. (Supp. Tr. 146).

In August 2011, the Company sold the newly combined Lancaster/Lexington company sales route and the Newark/Granville/Zanesville company sales route to independent distributor Buckeye Distributing. (Supp. Tr. 147). Each of the displaced drivers bumped into other routes. Respondent notified the Union steward about these sales. (Supp. Tr. 184). The Union made no request to bargain, and it never filed a grievance, an unfair labor practice charge, or an information request. (Supp. Tr. 150-151).

In October 2011, Respondent informed the Union that it intended to sell a remote sales route in Marion, Ohio (Angie Watson's route) to an independent distributor (later Buckeye Distributing). On November 9, 2011, the Union business agent, Michael Maddy, filed a grievance over this announced sale, alleging that it would violate the parties' agreement. Maddy requested to bargain over the decision and the effects of that decision, prior to taking any action. (R. Exh. 50 and Supp. CP Exh. 1, pgs. 1-2). On November 14, 2011, human resources director Sharon K. Willie responded, stating:

> The Company denied the grievance that was filed on November 9, 2011, by the sales/over-the-road employees to challenge the Company's potential decision to subcontract one of its routes in Columbus, Ohio, to an independent contractor. We believe the Company has the right to subcontract routes based on the Management Rights Article of the Labor Agreement, as well as a long-standing past practice of subcontracting other routes without objection from the Union. However, the Company is willing to meet with the Union to discuss this subcontracting matter at your earliest convenience, and the Company is willing to bargain with the Union over the effects of any final decision….

(Supp. CP Exh. 1 pg. 3).

On December 8, 2011, Maddy sent Wille a letter outlining a proposed settlement to resolve the outstanding grievance. The proposal contained terms similar to the arrangement the parties negotiated for the four drivers whose routes were eliminated with the closure of the Portsmouth distribution center. That same day, Willie responded to Maddy's letter, stating:

> I received your letter today offering to settle this grievance.
>
> As you know from our meeting yesterday, Mike-sell's has a long standing practice of changing the distribution method of its products, both sending the distribution in some areas out to distributors and bringing it back in-house numerous times over the years. Article XIX, Section 1 of the CBA gives Management that right.
>
> In this particular grievance, Ms. Watson's route was transferred to Buckeye Distributing for economic and logistical reasons. Ms. Watson was then permitted to bump into the local Distribution Center and had her choice of any of some 17 routes. Ms. Watson did select a route and bump into the local Distribution Center. Ms. Watson has now decided she does

meanor while testifying, and he personally was involved in the effects bargaining negotiations.

> not want the route she selected and that she in fact wants to leave the Company and she gave a two week notice yesterday of intent to end her employment with Mike-sell's effective December 21, 2011.
>
> Your letter indicates the Union now wants the Company to pay her $5,000 and sixty days additional health coverage or the Union will move this case to arbitration. We will not agree to this arrangement however, we will agree not to contest any claim for unemployment compensation ….

(R. Exh. 50).

On December 12, 2011, after the parties were unable to resolve the grievance, the Union notified Respondent that it would take the matter to arbitration. (Supp. CP Exh. 1, pg. 6). The arbitration hearing occurred on June 27, 2012. Respondent and the Union submitted post-hearing briefs.[10] On September 26, 2012, Arbitrator Paolucci issued his decision, holding that absent clear contractual language, the management rights provision gave Respondent the right to control distribution and determine profitability, which included the right to sell the unprofitable Marion route to a third party. (R. Exh. 2).

In May 2012, Respondent sold the Celina/Coldwater company sales route to independent distributor Ryan Young Distributing. (Supp. Tr. 160-161).[11] The unit driver (Todd Regelsberger) for this route bumped into another route out of the Greenville distribution center. (Supp. Tr. 168). Respondent notified the Union steward about this sale. The Union made no request to bargain. It also never filed a grievance, an unfair labor practice charge, or an information request. (Supp. Tr. 169-170).

On October 10, 2012, on the first day of bargaining over a successor contract, Respondent informed the Union that it intended to sell 29 company sales routes in Columbus, Sabina, and Cincinnati, Ohio, effective November 18, 2012, because of Respondent's "dire" financial situation. (Tr. 302–303). Respondent eventually sold these 29 routes to independent distributor Keystone Distributing, Ltd./Buckeye Distributing Company. The Union never demanded to bargain over the decision to sell these routes, but it did request, and the parties met, to bargain over the effects. (Tr. 305). On April 24, 2013, prior to a contract negotiation session, Respondent informed the Union that it intended to sell five company sales routes in Greenville, Ohio, to independent distributor Earl Gaudio & Son, Inc., effective June 2013. The Union again did not request to bargain over the decision, but it did request, and the parties met, to bargain over the effects. (Tr. 316–321). About a month later, Gaudio's parent company filed for bankruptcy, and the five Greenville routes reverted back to Respondent. In July 2013, Respondent resold these five Greenville routes to an independent distributor Helm Distributing. Respondent did not provide the Union with notice that these routes reverted back or that they were going to be, or had been, resold to Helm Distributing. (Tr. 327-331). There is no evidence as to who serviced these routes between reversion and resale. (Tr. 703).

On July 17, 2013, Respondent notified the Union it was selling its four Springfield routes to an independent distributor (Helm Distributing Company), effective August 17, 2013. (R. Exh. 8). (Tr. 338–340). The Union did not make a demand to bargain over the decision to sell the routes, but it did request, and the parties met, to bargain over the effects. The next time Respondent sold a company sales route to an independent distributor was almost three years later, in 2016, when Respondent began selling the four routes at issue.[12]

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[10] In its post-hearing brief to the arbitrator, Respondent discussed the struggles with having Watson operate the Marion route, and the steps it took over the years to address those matters:

> For the first six years of her employment; Grievant traveled from her home in Marion, Ohio, to the Columbus Distribution Center in order to pick up product to be delivered. According to Grievant, this was a 136-mile round–trip commute (i.e., 68 miles each way) …. Starting in 2000, in order to become more cost-effective, the Company arranged for a temporary storage bin to be maintained in Mansfield, Ohio, which allowed Grievant (as well as a sales route driver in Mansfield) to travel to the Mansfield storage bin instead of to the Columbus Distribution Center in order to pick up product. According to Grievant, this was a round–trip commute of over 80 miles (i.e., over 40 miles each way). In 2006 or 2007, in an effort to achieve even greater efficiency, the Company closed the Mansfield storage bin and opened a new storage bin in Marion, Ohio, where Grievant then picked up the product to be delivered.

(CP Exh. 1, pg 5 fn. 5).

Also, Respondent went on to state that despite these steps to make the route "economically feasible," by October 2011, it "was losing over $1,100.00 per week … due in large part to costs for the storage bin and the over-the-road drivers used to deliver product to this remote area of the Columbus Distribution Center territory." (CP Exh. 1, pgs 5-6). In its post-hearing brief, which was served on the Union, Respondent argued it was permitted to sell the Marion route unilaterally because:

> The Labor Agreement does not prohibit the selling of routes to independent distributors, the management rights clause grants the Company the exclusive right to control (among other things) distribution methods, and Mike-sell's has a long history of making such decisions unilaterally. The Company's unilateral right to sell routes to independent distributors is amply demonstrated by the fact that the Union has been aware of the sale of outlying routes on several occasions yet has failed to object to their sale, either through the filing of a grievance or an unfair labor practice charge.

(CP Exh. 1, pgs 6-7).

[11] At the hearing, Respondent sought to introduce a bill of sale and independent distributor agreement between Respondent and Ryan Young Distributing to corroborate that Respondent sold the Celina/Coldwater route to Ryan Young Distributing. The documents, however, relate to other routes (in Lima, Ohio), but include a map of the sales territory conveyed to Ryan Young Distributing, and it encompasses the Celina/Coldwater area. Counsel for General Counsel and Charging Party's counsel objected to the introduction of the document. I sustained the objection and placed the document in the rejected exhibit file. (Rej. R. Exh. 51). I am reversing my ruling and now receive the document over objection. The document reflects the Celina/Coldwater area as part of Ryan Young Distributing's territory, and I have credited Plummer's independent testimony that Ryan Young Distributing purchased the Celina/Coldwater route. That testimony was largely corroborated by Sharon K. Willie, who created the document. (Supp. Tr. 275-277).

[12] As explained on pages 5-6 of my Initial Decision, Respondent resold 38 routes from 2013 through 2015 that reverted back to Respondent after the independent distributors that purchased those routes went bankrupt or were no longer able to perform the routes. They included the 29 routes in Columbus, Sabina, and Cincinnati, Ohio, the five routes in Greenville, Ohio, and the four routes in Springfield, Ohio. The (re)sales of these routes are distinguishable from the sale of "company sales routes" because after they reverted back to Respondent, they were not reassigned to, or performed by, unit employees. Instead, the independent distributor (or a third party) continued to operate the route(s) until they were resold to a different independent distributor.

4. Analysis

Applying *Raytheon*, Respondent must prove that: (1) it had an established past practice of unilaterally selling company sales routes to independent distributors; and (2) the sales at issue in 2016 did not materially vary in kind or degree from that established past practice. Based on the evidence, I find Respondent has failed to meet its burden. First, Respondent has not established that it unilaterally sold company sales routes to independent distributors with such regularity and frequency that employees could reasonably expect those sales would continue or reoccur on a regular or consistent basis. As the following illustrates, Respondent's prior sales of company sales routes were neither regular nor consistent:[13]

[13] At the hearing, the Union argued Respondent failed to prove the Union had timely notice of Respondent's decisions to sell those routes because Respondent, at most, notified Union stewards about the sales, and stewards are not designated to receive notice of such changes. I reject this argument. The Board has held that notice to stewards may not be sufficient to serve as notice to the union. See *Brimar Corp*., 334 NLRB 1035, 1035 fn. 1 (2001) (union steward's knowledge of a unilateral change could not be imputed to the union because steward had no role in matters relating to bargaining and the employer had no reason to believe otherwise); and *Catalina Pacific Concrete Co*., 330 NLRB 144, 144 (1999) (employer had no reasonable basis to believe union steward had the authority to act as the union's agent with respect to receiving notice of proposed unilateral changes), enfd. 19 Fed. Appx. 683 (9th Cir. 2001). However, Respondent's witnesses (Mark Plummer and Barry Wilson) confirmed they notified the local Union steward regarding prior sales and were never told they had to notify someone else in the Union, other than the steward, about these matters. (Supp. Tr. 28; 123-124). Additionally, Respondent provided notice of certain of these sales to then-Union steward Stephen Donnell, who also was a member of the Union's negotiating committee, including the one that negotiated the parties' 2008 collective-bargaining agreement. (Supp. Tr. 172-174). Donnell testified he was not aware of any rule or policy that Respondent was required to communicate directly with a Union business agent or officer, as opposed to a steward. (Supp. Tr. 176-177). The Union never informed Respondent after any of these prior sales that stewards lacked authority to receive notice, or that notice to them did not constitute notice to the Union. I, therefore, find that, absent evidence to the contrary, it was reasonable for Respondent to conclude that notice to a steward constituted notice to the Union. That being said, I make no findings as to whether the notice given was sufficient to trigger the Union's duty to request to bargain or was notice of a fait accompli. The record evidence is limited to when notice was given. In response to leading questions, Plummer and Donnell both confirmed the Union received "advanced notice" of the sales. (Supp. Tr. 134, 153, 169, 177, 180, 182-184, and 187). The only specific information concerned the Marion and Mansfield routes. Donnell estimated Respondent informed him about a week or two prior to those sales. (Supp. Tr. 190-191; 193-194).

Year	# of Company Sales Routes Sold	Routes Sold
1998-1999	1	Hamersville route
2000	0	
2001	0	
2002	4	Portsmouth routes[14]
2003	0	
2004	0	
2005	0	
2006	1	Muncie route
2007	0	
2008	0	
2009	3	Mansfield, Newark/Granville/Zanesville, and Lancaster/Hocking Hills/Athens routes
2010	0	
2011	3	Lancaster/New Lexington, Newark/Granville/Zanesville, and Marion routes
2012	30	Celina/Coldwater and 29 Columbus, Sabina, and Cincinnati routes
2013	9	5 Greenville and 4 Springfield routes
2014	0	
2015	0	

[14] Although I credited Wilson that Respondent eliminated (as opposed to sold) the Portsmouth routes, I have included them because it later sold an area covering portions of those routes to an independent distributor.

Second, the circumstances surrounding these sales materially varied in kind and degree. Respondent sold or transferred the Hamersville routes and closed that distribution center because it was not profitable to continue operating those two routes out of that center. In 2002, Respondent eliminated the four Portsmouth routes and closed that distribution center because it was not profitable, and then sold a portion of the territory covered by those routes to an independent distributor. In 2006, Respondent sold the Muncie, Indiana route after the unit driver quit and no one else bid to take over her route. In 2012, Respondent sold the 29 routes in Columbus, Sabina, and Cincinnati to Keystone Distributing, Ltd./Buckeye Distributing Company, because of the company's "dire" financial situation. Other routes were sold when their assigned distribution center closed (e.g., Greenville) (Tr. 691-693).

In 2012, Respondent argued in the Watson arbitration that the Marion route continually lost money, primarily because of the high costs of maintaining the storage bin and delivering the product to a remote area. Arbitrator Paolucci relied upon that evidence and concluded that Respondent had the management right to unilaterally sell unprofitable routes. (R. Exh. 2, pp.18-21). Respondent later relied upon the Paolucci decision when it sold the 2016 routes. But I find the sale of the Marion route is distinguishable. Unlike the Marion route, Route 102 (Xenia) received its product directly from the Dayton distribution center, which was about 15 miles away, and there was no evidence presented, or argument made, to the Union that Respondent was selling the route because it was continually losing money. The same is true regarding the other three routes sold in 2016.

Respondent has argued that individual route profitability was never a factor in its decisions to sell any of the four routes at issue in 2016. Rather, it sold these routes as part of its plan to move away from distribution and focus more on product development and marketing its brand. As such, the sales in 2016 materially varied in kind and degree from the prior sales.[15]

In light of the foregoing, I find Respondent failed to prove an established past practice and/or that the unilateral sale of Route 102 was mere continuation of the status quo. I, therefore, maintain my prior findings and conclusions that these sales constituted changes to mandatory subjects of bargaining, which Respondent made without affording the Union prior notice and an opportunity to bargain, in violation of Section 8(a)(5) and (1) of the Act.

B. Routes 104 and 122

On August 29, 2016, Respondent sent the Union a letter stating that it will be eliminating two positions through the sale of Routes 104 and 122 (covering territory in Bellbrook and Beavercreek, Ohio), effective September 4, 2016. (Tr. 82-83; 153-155)(Jt. Exh. 6). Respondent noted that the affected drivers (Jerry Lake and Gerald Shimmer) would have an opportunity to rebid into other routes on September 1, 2016. On August 31, 2016, the Union, through business representative Alan Weeks, sent Respondent a letter disputing Respondent's claim that the Paolucci arbitration decision gave it the right to sell Routes 104 and 122. (Jt. Exh. 8). Specifically, the Union argued that Arbitrator Paolucci found no obligation to bargain based on the unprofitability of the route caused by the cost of providing product to that remote location, and the fact that similar unprofitable routes have been sold in the past. In contrast, the Union argued that no information has been provided showing that Routes 104 and 122 were unprofitable. The Union also pointed out the two routes at issue were within the Dayton, Ohio area and providing product to those routes did not cost more than providing product to any other route out of the Dayton distribution center, and Respondent has not previously sold a route within the Dayton service area. Based on these factors, the Union demanded Respondent meet and bargain over the decision to sell Routes 104 and 122. In order to be prepared for such bargaining, the Union requested the following information:

> 1. All documents that demonstrate the profitability of all of the Company's routes for the period from September 1, 2014 through August 1, 2016 so comparison can be made as to the profitability of all the routes on Route No. 104 and Route No. 122.
> 2. A copy of the agreement between Mike-Sell's and the entity to whom Route No. 104 and Route No. 122 is scheduled to be sold.
> 3. A description of how Mike-Sell's product is to be received by the entity to whom [R]oute No. 104 and Route No. 122 is scheduled to be sold.
> 4. A copy of all correspondence, including electronic correspondence between Mike-Sell's and the entity to whom Route No. 104 and Route No. 122 is scheduled to be sold from the date of the first such correspondence until August 29, 2016.

[15] At the supplemental hearing, Respondent attempted to establish commonality between the prior sales and the 2016 sales, primarily through the testimony of zone manager Mark Plummer. Plummer testified that Respondent sold all the routes between 2002 and 2013 based on: (1) overall company profitability; (2) profitability of the company's route sales division; and (3) the company's desire to move away from distribution and focus on manufacturing. Plummer's testimony on this point appeared rehearsed; he gave the same rote, seemingly scripted response eight separate times when asked how Respondent determined which routes to sell. (Supp. Tr. 129, 134, 135, 137, 141, 143, 150, 153, and 169). In fact, he gave this same stock response regarding why Respondent decided to sell the Muncie route, even though the evidence establishes Respondent sold the Muncie route only after the assigned driver quit and no one bid to take it over. Furthermore, Respondent offered no documentary evidence (e.g., correspondence, planning documents, meeting notes, etc.) that this was how or why it sold these routes, which is remarkable considering the Respondent's argument that the sales were part of a greater initiative to shift the corporate focus away from distribution toward manufacturing. Finally, Stephen Connell, a former Union steward who later became a manager, was *called by Respondent* to testify about his experiences receiving notice from Respondent that it was selling company sales routes. According to Connell, Respondent never mentioned that its route sales division was not profitable, or that it wanted to move away from distribution and focus more on manufacturing. (Tr. 214-215; 217).

The Union concluded by requesting Respondent delay the sale of the two routes until the Union had an opportunity to review the requested information and the parties met for bargaining. (Jt. Exh. 8).

On September 12, 2016, Respondent replied to the Union's August 31, 2016 letter. Respondent disputed the Union's interpretation of the Paolucci arbitration decision, arguing that the Union was reading the decision too narrowly, particularly that it only applied to the sale of unprofitable routes. Respondent noted that the arbitrator "specifically rejected the Union's argument 'that the Company did this simply because the costs were too high,' finding instead that '[w]here an entire business unit is transferred, the factors justifying the change are much more numerous than a simple measure of cost savings.'" In short, Respondent argued that the arbitrator "recognized that [t]he Company has chosen a different manner of operating its business, and [a]bsent clear contract language, it must be found that the management right to control distribution, and determine profitability, allows the [Company to sell its routes to independent distributors without bargaining with the Union.]" (internal quotations omitted). Respondent went on to say that it exercised its "inherent management right" to determine methods of distribution by selling Routes 104 and 122, just as it did by selling Route 102 in July 2016. The last paragraph of Respondent's letter states:

> Because Arbitrator Paolucci's award makes it clear that Mike-Sells has the management right to change distribution methods in accordance with strategic objectives, we respectfully decline to bargain over our decision to sell Company routes; to delay the sale of Routes 104 and 102 pending such decisional bargaining; or to respond to information request designated specifically for the purpose of engaging in such decisional bargaining.

(Jt. Exh. 9).

In a footnote, Respondent stated it remained willing to bargain over the effects of the route eliminations, if any, and remained willing to provide relevant information for that purpose. But because the arbitration award confirmed that Respondent had the managerial discretion to unilaterally sell company routes, it is not a mandatory subject of bargaining; therefore, Respondent did not believe that the Union's August 31 information request (which was made for the purpose of decisional bargaining) was presumptively relevant or necessary for the Union to perform its statutory duties. (Jt. Exh. 9). Respondent did not provide the Union with the information it requested and it refused the Union's request to bargain over the decision to sell these two routes. (Tr. 475).

Paragraph 7 of the amended complaint alleges that Respondent failed and refused the Union's request to bargain over the decision to sell Routes 104 and 122, in violation of Section 8(a)(5) and (1) of the Act. Unlike the allegation over the sale of Route 102, which was a "unilateral change" allegation, this is a "refusal to bargain" allegation. The *Raytheon* majority made clear that its holding did not alter an employer's statutory obligation to bargain, upon request, regarding a mandatory subject of bargaining, and the existence of an established past practice does not permit the employer to refuse to bargain over the subject if requested to do so by the union.[16] Respondent, therefore, cannot rely upon its alleged past practice--which it has failed to establish--as a defense for refusing the Union's request to bargain over the sales at issue. And, for the reasons set forth my Initial Decision (sans any reliance on *DuPont 2016*), Respondent has failed to establish waiver. The *Raytheon* majority held waiver of this right may only occur contractually or if bargaining over the subject has already occurred. In this case, the management rights provision relied upon in the Paolucci decision expired and, as previously stated, even if Respondent had established a past practice of selling company sales routes without objection or requests for decisional bargaining by the Union, that does not constitute a waiver of the Union's right to bargain over the sale of the routes at issue. I, therefore, conclude Respondent had an obligation to bargain, upon request, over the decisions to sell Routes 104 and 122, and it violated Section 8(a)(5) and (1) of the Act when it refused the Union's request to do so. Respondent also violated Section 8(a)(5) and (1) of the Act when it failed or refused to provide to the Union with the information requested in the Union's August 31, 2016 letter and demand to bargain.

C. Route 131

On the same day (September 12, 2016) Respondent refused to bargain over the sale of Routes 104 and 122, stating it had the right to take such action unilaterally, and refused to provide the Union with the information it requested on August 31, 2016 regarding those sales, Respondent sent the Union a separate letter stating that in accordance with its "rights" as recognized in the Paolucci decision, Respondent was selling Route 131 (covering territory in Middletown and Springboro, Ohio), effective September 17, 2016. (Jt. Exh. 10). On that same date, Union steward Richard Vance filed a grievance regarding the sale of Route 131. The route was eventually sold to Big TMT Enterprize, LLC. The parties later met on these and other grievances in January 2017, and Respondent denied any violations of the expired collective-bargaining agreement.

Paragraph 8 of the amended complaint alleges Respondent refused the Union's request to bargain over the sale of Route 131, in violation of Section 8(a)(5) and (1) of the Act. Like the sale of Routes 104 and 122, this is a "refusal to bargain" allega-

[16] In *Owens-Corning Fiberglas*, 282 NLRB 609 (1987), the Board majority held that "a union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all times." Id. at 609 (citing to *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983)). In *NLRB v. Miller Brewing Company*, 408 F.2d 12 (9th Cir. 1969) enfg. 166 NLRB 831 (1968) the Court of Appeals held that:

> [I]t is not true that a right once waived under the Act is lost forever…. Each time the bargainable incident occurs … [the] Union has the election of requesting negotiations or not. An opportunity once rejected does not result in a permanent "close out" …

(Internal citations omitted).

tion, and not a "unilateral change" allegation. The difference is that, unlike the sales of Routes 104 and 122, the Union did not make an actual request to bargain over the sale of Route 131. As stated in my Initial Decision, I find that the Union's failure to request bargaining over this particular sale is excused because Respondent announced the sale of Route 131 as a fait accompli. The cited evidence--not the least of which is Respondent's September 12, 2016 response to the Union's information request--establishes Respondent had a fixed intent and was not willing to bargain over the decision to sell this, or any other, route. Again, for the reasons set forth in my Initial Decision (sans any reliance on *DuPont 2016*), and for the reasons stated above regarding the sales of Routes 104 and 122, I find that Respondent's other waiver arguments fail. I, therefore, conclude Respondent also violated Section 8(a)(5) and (1) of the Act when it refused the Union's request to bargain over the decision to sell Route 131.

IV. CONCLUSIONS OF LAW

1. Respondent, Mike-Sell's Potato Chip Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, International Brotherhood of Teamsters (IBT), General Truck Drivers, Warehousemen, Helpers, Sales and Service, and Casino Employees, Teamsters Local Union No. 957, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the certified collective-bargaining representative for the following unit of Respondent's employees:

> [A]ll Sales Drivers, and Extra Sales Drivers at [Respondent's] Dayton Plant, Sales Division and at [Respondent's] Sales Branch in Cincinnati, Columbus, Greenville, Sabina and Springfield, Ohio and all over the road drivers employed by [Respondent], but excluding all supervisors, security guards, and office clerical employees employed by [Respondent].

4.Respondent has violated Section 8(a)(5) and (1) of the Act since July 2016 by failing and/or refusing to bargain with the Union about its decision to subcontract bargaining unit work from unit employees to others outside the bargaining unit when it sold Routes 102, 104, 122, and 131; and by failing to provide the Union information requested on August 31, 2016, that is relevant and necessary to its role as collective-bargaining representative.

5. By this conduct Respondent has engaged in unfair labor practices affecting commerce within the meaning Section 2(6) and (7) of the Act.

6. Respondent has not violated the Act except as set forth above.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it is ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Affirmatively, Respondent shall, upon request from the Union, rescind the sales of Routes 102, 104, 122, and 131. Respondent shall, upon request, bargain with the Union regarding the decision to subcontract or sell company sales routes. Respondent shall make any employees whole, with interest, for any loss of earnings resulting from Respondent's refusing the Union's request to bargain over the subcontracting of bargaining unit work associated with the sale of Routes 102, 104, 122, and 131 to independent distributors. The Respondent will compensate employees for any adverse tax consequences for receiving lump-sum backpay awards by payment to each employee of the amount of excess tax liability owed, and will file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee. The Respondent shall provide the Union with the information requested in its August 31, 2016 information request.

Respondent shall post an appropriate informational notice, as described in the attached Appendix. This notice shall be posted at the Respondent's Dayton facility wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since July 11, 2016. When the notice is issued to Respondent, it shall sign it or otherwise notify Region 9 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

Respondent, Mike-Sell's Potato Chip Company, at its Dayton, Ohio facilities, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to bargain with the Union as the designated collective-bargaining representative of the following bargaining unit of the employees regarding their wages, hours, and other terms and conditions of employment, including, but not limited to, the subcontracting of bargaining unit work through the sale of company sales routes.

> [A]ll Sales Drivers, and Extra Sales Drivers at [Respondent's] Dayton Plant, Sales Division and at [Respondent's] Sales Branch in Cincinnati, Columbus, Greenville, Sabina and Springfield, Ohio and all over the road drivers employed by [Respondent], but excluding all supervisors, security guards, and office clerical employees employed by [Respondent].

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Failing or refusing to provide the Union with requested information, such as the

Information requested in the Union's August 31, 2016 information request that is relevant and necessary to the Union's role as collective-bargaining representative.

(c) In any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Bargain, upon request, with the Union regarding changes to wages, hours, or other terms and conditions of employment of bargaining unit employees, including, but not limited to, the subcontracting of bargaining unit work through the sale of company sales routes.

(b) Upon request from the Union, rescind the sales of Routes 102, 104, 122, and 131 to independent distributors.

(c) Make affected employees whole, with interest, for any loss of earnings resulting from the refusal to bargain over the subcontracting of unit work through the sale of Routes 102, 104, 122, and 131 to independent distributor, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

(d) Compensate affected employees for any adverse tax consequences for receiving lump-sum backpay awards by payment to each employee of the amount of excess tax liability, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(e) Within 14 days after service by the Region, post at its facilities in Dayton, Ohio copies of the attached notice marked Appendix A.[18] Copies of the notice, on forms provided by the Regional Director for Region 9 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places throughout its Dayton, Ohio facility, including all places where notices to employees are customarily material. In the event that, during the pendency of these proceedings, the Respondent has closed certain facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 11, 2016.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., December 27, 2018.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT fail or refuse to bargain in good faith with International Brotherhood of Teamsters (IBT), General Truck Drivers, Warehousemen, Helpers, Sales, and Service, and Casino Employees, Teamsters Local Union No. 957 (Union) as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

> All sales drivers, and extra sales drivers at the [Respondent's] Dayton Plant, Sales Division and at the [Respondent's] Sales Branch in Cincinnati, Columbus, Greenville, Sabina and Springfield, Ohio and all over-the-road drivers employed by the [Respondent], but excluding all supervisors, security guards, and office clerical employees employed by the [Respondent].

WE WILL NOT refuse requests to meet and bargain in good faith with your Union over any proposed changes in wages, hours, and working conditions before putting such changes into effect.

WE WILL NOT refuse to provide the Union with information that is relevant and necessary to its representational duties.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL upon request, bargain in good faith with the Union as the exclusive collective-bargaining representative of our unit employees about the sale of Routes 102, 104, 122 and 131.

WE WILL if requested by the Union, rescind the sales of our Ohio Routes 102, 104, 122, and 131 that we made without bargaining with the Union and assign those routes to unit employees.

WE WILL pay you for the wages and other benefits lost because of the sales of our Ohio Routes 102, 104, 122, and 131 that we made without bargaining with the Union, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate employees for the adverse tax conse-

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

quences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed by agreement, a report allocation the backpay award to the appropriate calendar year(s).

WE WILL promptly furnish the Union with the following information requested in its August 29, 2016 information request letter: (1) documents showing the profitability of Respondent's routes for the period September 1, 2014 through August 1, 2016, so a comparison could be made between all of the routes to Routes 104 and 122; (2) a copy of the agreement between Respondent and the entity who is scheduled to purchase these routes; (3) a description of how Respondent's product is to be received by the entities purchasing these routes; and, (4) a copy of all correspondence between Respondent and the entity who is scheduled to purchase these routes.

MIKE-SELL'S POTATO CHIP COMPANY

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/09-CA-184215 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.